Senate Committee on Natural Resources and Economic Development

Interim Report
to the
85th Legislature

November 2016

Table of Contents

Charge No. 3

Charge No. 4

Senator Craig Estes
Chairman
Senator Brian Birdwell
Senator Troy Fraser
Senator Bob Hall
Senator Kelly Hancock

Senator Juan "Chuy" Hinojosa
Senator Eddie Lucio, Jr.
Senator Robert Nichols
Senator Kel Seliger
Senator Carlos Uresti
Senator Judith Zaffirni

The Texas Senate Committee on Natural Resources and Economic Development

November 15, 2016

The Honorable Dan Patrick
Lieutenant Governor of Texas
Room 2E.13
Texas State Capitol
Austin, Texas 78701

Dear Lieutenant Governor Patrick:

The Senate Committee on Natural Resources and Economic Development of the Eighty-Fourth Texas Legislature hereby submits its interim report to the Eighty-Fifth Texas Legislature.

We thank you for the opportunity to address these important issues.

Respectfully Submitted,

Senator Craig Estes, Chair

Senator Brian Birdwell

Senator Troy Fraser

Senator Bob Hall

Senator Kelly Hancock

Senator Juan "Chuy" Hinojosa

Senator Eddie Lucio, Jr.

Senator Robert Nichols

Senator Carlos Uresti

Senator Kel Seliger

Senator Judith Zaffirini

The Senate of The State of Texas

November 15, 2016

The Honorable
Craig Estes, Chair
Senate Committee on Natural Resources and Economic Development
P.O. Box 12068
Austin, Texas 78711

Dear Chair Estes:

Thank you for your leadership as Chair of the Senate Committee on Natural Resources and Economic Development and for organizing three informative hearings and developing a comprehensive Interim Report to the 85th Legislature. It is our privilege to serve with you, and we appreciate the opportunity to share our perspective regarding the Committee's interim report. Because the interim report includes many reasonable recommendations, we are pleased to sign it. We submit this letter to be included in the report, however, as a record of some of our concerns.

Regarding the interim charge concerning the implementation of the Environmental Protection Agency's (EPA) regulations, we agree strongly with the recommendation that the Texas Emissions Reduction Plan should be extended. We believe, however, the Committee should have included information that could support EPA's efforts to protect our environment. While the EPA certainly is not infallible and our state always should hold it accountable, the report makes it difficult to evaluate objectively the merits of any particular EPA policy and its impact on Texas. This could have been alleviated by reporting more extensively the viewpoint of the many stakeholders who believe strongly in the health and economic benefits of environmental protection.

On a related note, we question the recommendation to fully fund and support the Attorney General's Office in its ongoing battles against overreach by the EPA and other federal agencies. While fully funding the operations of the Attorney General is supported, it is a subjective determination to imply all activities taken by the EPA are overreach. We are unaware of the Attorney General's Office ever being

P.O. Box 12068 • Austin, Texas 78711 • Telefax 512/463-0326 • TDD 1-800-735-2989

precluded from challenging federal regulations or failing to receive adequate support for its efforts. What's more, according to a November 13 *Houston Chronicle* article, the Attorney General recently announced that he is shifting from suing the federal government to lobbying it. If so, he may have surplus funds.

Regarding the economic development charge, we agree with the recommendation that the legislature should study its methodologies for creating and maintaining economic development initiatives both because of the compelling facts presented in the report and because the legislature always should continue to monitor its initiatives. Nevertheless, we respectfully disagree with the recommendation to implement broad-based property tax reform by reduced rollback rates and other means because it is beyond the scope of the interim charge and the report's findings.

Finally, concerning the expedited permitting charge, we appreciate the report's detailed background regarding the permitting process in Texas, but we are concerned by the recommendation to consider eliminating the contested case hearing process and to adopt in its place a notice-and-comment process with an appeal option similar to that of the EPA's Environmental Appeals Board. We believe it is premature to adopt this recommendation without providing an opportunity for the public and the Committee to discuss this option fully and to study its history and impact.

Thank you for your dedication to these important issues. We look forward to our continued productive relationship during the 85th Legislative Session.

May God bless you.

Very truly yours,

Judith Zaffirini | Juan "Chuy" Hinojosa | Carlos I. Uresti

THE SENATE OF TEXAS

STATE CAPITOL, 3S.5
AUSTIN, TEXAS 78711
(512) 463-0127

1210 W. INTERSTATE 2, STE. 10
PHARR, TEXAS 78577
(956) 787-5227

7 NORTH PARK PLAZA
BROWNSVILLE, TEXAS 78521
(956) 548-0227

700 EAST KLEBERG AVENUE
KINGSVILLE, TEXAS 78363
(361) 592-3252

SENATOR
EDDIE LUCIO, JR.

November 15, 2016

Hon. Craig Estes, Chairman
Senate Committee on Natural Resources & Economic Development
325 Sam Houston Building

Dear Chairman Estes:

Congratulations is well deserved for the smooth transition of the Senate Committee on Natural Resources & Economic Development. I thank you and your staff for the exemplary work performed in developing a committee report on interim charges provided by Lt. Governor Patrick. I'm pleased to sign the report, and commend you for developing consensus recommendations. Especially, I am grateful for the review of many strides enhancing the aerospace industry in Texas.

I respectfully submit this letter with additional perspective on certain recommendations of Charge #3 relating to economic development incentives, particularly Chapter 313 of Texas Tax Code. Like you, I represent rural towns and economically-distressed communities which benefit from the ability to attract employers and strengthen their economies by applying Chapter 313. As the committee reviews measures to amend Chapter 313, I encourage careful consideration of an approach that does not disable small communities from attracting large-scale business by applying certain waivers. Small communities must remain competitive in incentivizing capital-investment through the effective economic development tools provided by the state. It is important to ensure against any unintended consequences that may chill or cripple local jurisdictions.

Additionally, the report addresses property tax reform and rollbacks; I believe this exceeds the limitations of the charge as provided. As a member of the Select Committee on Property Tax Reform and Relief I was honored to travel the state and witness testimony from the public on

THE SENATE OF TEXAS

STATE CAPITOL, 3S.5
AUSTIN, TEXAS 78711
(512) 463-0127

1210 W. INTERSTATE 2, STE. 10
PHARR, TEXAS 78577
(956) 787-5227

7 NORTH PARK PLAZA
BROWNSVILLE, TEXAS 78521
(956) 548-0227

700 EAST KLEBERG AVENUE
KINGSVILLE, TEXAS 78363
(361) 592-3252

SENATOR
EDDIE LUCIO, JR.

this very important issue. I've reserved comments on this subject for the Select Committee's report.

Thank you for the opportunity to share my thoughts with you in this report. I'm confident of the success of Texas with you at the helm of this extremely important committee.

Sincerely,

Eddie Lucio, Jr.

Interim Charges

In the fall of 2015, the Senate Committee on Natural Resources and Economic Development was charged with conducting a thorough and detailed study of the following issues and preparing recommendations to address problems or issues that were identified in the process:

1. **Implementation of Federal Regulations:** Study the impact and identify challenges Texas faces implementing proposed federal Environmental Protection Agency regulations, including, but not limited to the Clean Power Plan, Reduction of Methane & Volatile Organic Compounds (VOCs) from oil and gas facilities, Ozone standards, Regional Haze, and Waters of the U.S. Make recommendations for legislative or constitutional action the committee considers necessary.

2. **Texas Emission Reduction Plan (TERP):** Study and make recommendations regarding the use of Texas Emission Reduction Plan (TERP) funds, including reducing air emissions from mobile sources in response to changes in ozone standards.

3. **Economic Development:** Evaluate the effectiveness and necessity of programs and resources currently used to support economic development in Texas. Make recommendations regarding continuation of effective strategies, modification of existing administrative or regulatory barriers, and the reduction or elimination of ineffective programs.

4. **Expedited Permitting:** Evaluate the permitting process in Texas and neighboring states and make recommendations for eliminating unnecessary barriers and expediting the process to ensure that the regulatory process is consistent and predictable.

5. **ERCOT/PUC Electricity Issues:** Conduct legislative oversight and monitoring of agencies and programs under the committee's jurisdiction. In this oversight and monitoring, the committee should: 1) identify and recommend opportunities to streamline programs or services and enhance grid safety while maintaining the mission of ERCOT and PUC and their programs; and 2) identify barriers ERCOT or PUC may have in their governance that may be appropriate to improve or eliminate.

6. **Oil Field Theft:** Study and make recommendations for solving the oil field theft problems facing Texas, including identifying the proper mechanisms for increasing enforcement effectiveness.

7. **Monitoring Charge:** Monitor the implementation of legislation addressed by the Senate Committee on Natural Resources and Economic Development during the 84th Legislature, Regular Session and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) Legislation relating to Texas aerospace incentives; 2) Expediting permitting; and 3) Electric utility rate adjustments.

Interim Hearings Held

November 6, 2015, *Capitol Extension Rm. E1.012*
The Committee heard invited testimony on Charge Nos. 2 and 6.

April 1, 2016, *Capitol Extension Rm. E1.012*
The Committee heard invited and public testimony on Charge Nos. 3, 4, and 7.

September 28, 2016, *Capitol Extension Rm. E1.012*
The Committee heard invited testimony on Charge No. 1.

Interim Charge Discussion and Recommendations

Charge No. 1

Implementation of Federal Regulations: *Study the impact and identify challenges Texas faces implementing proposed federal Environmental Protection Agency regulations, including, but not limited to the Clean Power Plan, Reduction of Methane & Volatile Organic Compounds (VOCs) from oil and gas facilities, Ozone standards, Regional Haze, and Waters of the U.S. Make recommendations for legislative or constitutional action the committee considers necessary.*

I. Background

Over the course of President Obama's two terms in office, the Environmental Protection Agency (EPA) has promulgated a series of new regulations designed to protect the environment. Many of these rules will impact the State of Texas significantly, both in terms of their compliance costs and their effects on the State's economy. The Senate Committee on Natural Resources and Economic Development (Committee) examined nine EPA regulations in response to Lieutenant Governor Dan Patrick's interim charge to study this issue: the New Source Performance Standards for Oilfield Methane and Volatile Organic Compounds, the revised National Ambient Air Quality Standards for Tropospheric Ozone, the Clean Power Plan, the Mercury and Air Toxics Standards, the Cross-State Air Pollution Rule, Regional Haze, the application of the Sulfur Dioxide National Ambient Air Quality Standards, the Start-Up, Shutdown, and Malfunction State Implementation Plan Call, and the revisions to the regulatory definition of "waters of the United States."

A. Overview of the EPA's Authority

At President Nixon's urging, Congress created the EPA in 1970 to unite federal regulation and enforcement of air, water, and waste pollution controls under a single roof.[1] Major amendments to the Clean Air Act[2] in 1970 and the enactment of the Clean Water Act[3] in 1972, the Safe Drinking Water Act[4] in 1974, the Resource Conservation and Recovery Act,[5] and the Toxic Substances Control Act of 1976[6] subsequently granted the EPA far-reaching regulatory authority over much of the nation's economy. Regulations properly issued by the EPA pursuant to these enabling acts carry the full force of federal law.[7] Accordingly, valid EPA regulations

[1] THE GUARDIAN, *Origins of the EPA* (Spring 1992), available at: https://archive.epa.gov/epa/aboutepa/guardian-origins-epa.html (September 30, 2016).
[2] 42 U.S.C. §§ 7401–7671q.
[3] 33 U.S.C. §§ 1251–1387.
[4] 42 U.S.C. §§ 300f–300j–25.
[5] 42 U.S.C. §§ 6901–6992k.
[6] 15 U.S.C. §§ 2601–2692.
[7] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'").

override all conflicting state laws and constitutional provisions under the Supremacy Clause of the United States Constitution.[8]

As a general matter, the EPA's enabling acts empower it to set national standards for air, water, and waste pollution after studying the harm done to the public health or welfare by the pollutants in question.[9] The acts then provide for a process by which each state submits a plan[10] to the EPA detailing how the state will implement and achieve the minimum federal standard for each pollutant in question, if it has not already done so, and monitor compliance going forward.[11] The EPA next reviews the proposed state plan.[12] If the EPA finds the plan sufficient, it allows the state to administer the plan.[13] If a state fails to submit a plan at all or submits a plan that the EPA finds lacking, the acts require the EPA to design and implement a federal plan to force the state into compliance.[14] The EPA is also required to implement a federal plan if a state submits a sufficient plan but then fails to follow it.[15]

In the context of the Clean Air Act, the EPA originally maintained that greenhouse gasses like carbon dioxide and methane were neither subject to federal regulation nor proven to be harmful to the public health or welfare.[16] A coalition of states and environmental activists challenged the EPA's refusal to regulate greenhouse gasses under the Clean Air Act in the early 2000s and ultimately obtained a ruling from the United States Supreme Court ordering the EPA to study and determine whether greenhouse gasses were harmful to the public health or welfare.[17] On December 15, 2009, the EPA published a finding that greenhouse gasses were a danger to the public health and welfare based on its conclusion that they contributed to extreme weather events, rising sea levels, and poor crop yields.[18] The EPA subsequently began regulating greenhouse gasses along with more traditional pollutants under the same framework outlined above.[19]

---

[8] U.S. Const. Art VI, cl. 2. *See City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) ("'[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."); *Missouri v. City of Glasgow*, 152 F.3d 802, 805 (8th Cir. 1998) ("The Supremacy Clause of the federal Constitution dictates that a state law (whether a statutory or constitutional provision) cannot prevent the administration and execution of a federal statute.").

[9] *E.g.*, 33 U.S.C. § 1252(a) (2016); 42 U.S.C. §§ 6907(a), 7408(a) (2016).

[10] In the context of the Clean Air Act, this plan is known as the "State Implementation Plan" (SIP).

[11] *E.g.*, 33 U.S.C. § 1313; 42 U.S.C. §§ 6947, 7410.

[12] *E.g.*, 33 U.S.C. § 1313; 42 U.S.C. §§ 6947, 7410.

[13] *E.g.*, 33 U.S.C. § 1313; 42 U.S.C. §§ 6947, 7410.

[14] *E.g.*, 33 U.S.C. § 1313; 42 U.S.C. §§ 6926, 7410.

[15] *E.g.*, 33 U.S.C. § 1313; 42 U.S.C. §§ 6926, 7410.

[16] 68 Fed. Reg. 173, 52,922–33 (Sept. 8, 2003).

[17] *Massachusetts v. EPA*, 549 U.S. 497, 528–35 (2007).

[18] 74 Fed. Reg. 239, 66,496–99 (Dec. 15, 2009).

[19] *See* Environmental Protection Agency, *NSR Regulatory Actions*, Available at: https://www.epa.gov/nsr/nsr-regulatory-actions#ghg (Sept. 30, 2016).

B. National Ambient Air Quality Standards for Tropospheric Ozone

The Clean Air Act requires the EPA to issue "air quality criteria" for each pollutant in the ambient air that results from numerous or diverse mobile or stationary sources and that endangers the public health or welfare.[20] The criteria must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."[21] The Act then instructs the EPA to publish regulations prescribing National Ambient Air Quality Standards (NAAQS) and periodically revise them to set both "ambient air quality standards the attainment and maintenance of which . . . are requisite to protect the public health" and "a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."[22] The standards designed to protect human health are known as "primary" national ambient air quality standards, while those designed to protect the general welfare are known as "secondary" standards.[23]

Ozone is the primary component of smog.[24] The EPA listed tropospheric, or ground-level, ozone as a criteria pollutant on April 30, 1971, based on evidence that high concentrations increased the frequency of asthma attacks in some asthmatic individuals.[25] Ground-level ozone is the product of chemical reactions that occur in the presence of sunlight between nitrogen oxides (NO_x) and volatile organic compounds (VOCs).[26] Nitrogen oxides are byproducts of combustion, and the two largest sources of nitrogen oxides in the United States are vehicles and power plants.[27] Volatile organic compounds are molecules usually characterized by strong smells that are emitted as gasses from solid or liquid substances like paints, aerosols, and fuels.[28]

The EPA's original ground-level ozone standard was 80 parts-per-billion (ppb) averaged over a one-hour time period, but this was relaxed to 120 ppb in 1979.[29] The one-hour 120 ppb standard remained constant until 1997, when the EPA tightened it to 80 ppb averaged over an

---

[20] 42 U.S.C. § 7408(a) (2016).
[21] *Id.*
[22] *Id.* at § 7409.
[23] *Id. See also* Environmental Protection Agency, *NAAQS Table*, available at: https://www.epa.gov/criteria-air-pollutants/naaqs-table (Oct. 2, 2016).
[24] Clean Air Technology Center, *Nitrogen Oxides (NOx), Why and How They Are Controlled* 1 (Nov. 1999).
[25] *See* 36 Fed. Reg. 8186 (Apr. 30, 1971) (referring to ozone as "photochemical oxidants"). The Clean Air Act and the EPA regulate stratospheric and tropospheric ozone separately. *See generally* 42 U.S.C. §§ 7671–7671q (2016).
[26] Clean Air Technology Center, *Nitrogen Oxides (NOx), Why and How They Are Controlled* 1 (Nov. 1999).
[27] *Id.* at 4.
[28] *See* Environmental Protection Agency, *Volatile Organic Compounds' Impact on Indoor Air Quality*, available at: https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality (October 1, 2016).
[29] Environmental Protection Agency, *Table of Historical Ozone National Ambient Air Quality Standards (NAAQS)*, Available at: https://www.epa.gov/ozone-pollution/table-historical-ozone-national-ambient-air-quality-standards-naaqs (Sept. 18, 2016).

eight-hour time period.[30] The EPA subsequently lowered it to 75 ppb in 2008 and 70 ppb in 2015.[31] Each of these changes was made as a result of the EPA reevaluating the level of air quality it found was needed to protect the public welfare from "any known or anticipated adverse effects associated with the presence of"[32] ozone in the ambient air.[33]

The data on ozone concentrations in a particular region is produced by a network of air monitors that the Clean Air Act required the states to establish and maintain.[34] To determine whether a region is in compliance with the national ambient air quality standards, the EPA instructs the states to identify every monitor's fourth-highest, eight-hour average in each of the previous three years and then average those three, fourth-highest averages.[35] The single monitor with the highest resulting average determines whether the entire region in which it is located is in compliance with the national standard, and its average is known as the "design value" for that region.[36] If the design value is greater than 70 ppb, the region is not in compliance with the new national ambient air quality standards and becomes known as a "non-attainment" area.[37] If the design value is less than or equal to 70 ppb, the area is known as an attainment area.[38]

The Texas Commission on Environmental Quality (TCEQ) is the state agency charged with fulfilling Texas's obligations under the Clean Air Act.[39] Prior to the 2015 revisions, the TCEQ recognized only two ozone non-attainment areas remaining in Texas: Houston–Galveston–Brazoria and Dallas–Fort Worth.[40] The 2015 revisions have added San Antonio and El Paso to that list.[41] These areas include twenty-one counties the TCEQ has determined should be designated as non-attainment: Bexar, Brazoria, Chambers, Collin, Dallas, Denton, El Paso (with the exception of tribal lands), Ellis, Fort Bend, Galveston, Harris, Hood, Johnson, Kaufman, Liberty, Montgomery, Parker, Rockwall, Tarrant, Waller, and Wise.[42]

---

[30] Environmental Protection Agency, *Table of Historical Ozone National Ambient Air Quality Standards (NAAQS)*, Available at: https://www.epa.gov/ozone-pollution/table-historical-ozone-national-ambient-air-quality-standards-naaqs (Sept. 18, 2016).
[31] *Id*.
[32] 42 U.S.C. § 7409 (2016).
[33] *E.g.*, 80 Fed. Reg. 65,301 (Oct. 26, 2015) (summarizing health-based rationale for 2015 changes to ozone standard).
[34] 42 U.S.C. § 7410 (2016).
[35] Texas Commission on Environmental Quality, *Update on the 2015 Ozone Standard* 4–5 (Feb. 17, 2016).
[36] *Id*.
[37] *See* 80 Fed. Reg. 65,296 (Oct. 26, 2015).
[38] *See id*.
[39] Tex. Health & Safety Code § 382.0173 (2016).
[40] Texas Commission on Environmental Quality, *Nonattainment Areas* 1 (May 2012).
[41] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[42] Letter from Governor Gregg Abbott to Janet McCabe & Ron Curry, Attachment A (Sept. 30, 2016).

Figure 1: Design Values for Ozone Non-Attainment Areas in Texas[43]

Non-Attainment Area	2015 Design Value	2016 Design Value*
Dallas–Fort Worth	83	80
Houston–Galveston–Brazoria	80	79
San Antonio	78	71
El Paso	71	71

*****2016 Design Values are as of August 29, 2016, and subject to change over the rest of the year.

Under the 2015 revisions to the ozone standard, states had until October 1, 2016, to designate recommended non-attainment areas based on their design values.[44] The TCEQ expects areas with design values under 80 ppb to be considered "marginal" under the EPA's 2015 revisions, while areas with design values between 80 ppb and around 90 ppb will be considered "moderate."[45] The EPA will make this determination after reviewing complete monitoring data from 2016.[46] The EPA will make those designations final by October 1, 2017, and the State must calculate emissions inventories for all non-attainment areas by December 2019.[47] The State's deadline for bringing non-attainment areas into attainment is 2020 for marginal areas and 2023 for moderate areas.[48]

Areas that are designated non-attainment suffer significant economic consequences as a result. Entities wishing to move to or expand in non-attainment areas must either reduce emissions internally to avoid non-attainment new source review[49] or offset any emissions the move or expansion will add to the local air at a ratio that depends on whether the area is considered marginal or moderate.[50] Industry adding emissions to marginal areas must offset them at a rate of 1.1:1, while the ratio is 1.15:1 in moderate areas.[51] Offsets must be procured by purchasing credits on a local market from other companies that have reduced emissions by shutting down equipment or adding emission controls beyond those required by rule.[52] The costs are significant: in the year preceding this Report, the average cost of offsets in the Houston area was $87,500 per ton of nitrogen oxides and $198,565 for volatile organic compounds.[53] Offsets

[43] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[44] *Id.*
[45] *Id.*; Texas Commission on Environmental Quality, *Update on the 2015 Ozone Standard* 11 (Feb. 17, 2016).
[46] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[47] *Id.*
[48] *Id.*
[49] New source review is discussed at length in this Report's discussion of Interim Charge No. 4.
[50] Texas Commission on Environmental Quality, *Update on the 2015 Ozone Standard* 14–15 (Feb. 17, 2016).
[51] *Id.*
[52] Texas Association of Business, *A State Perspective on Federal Ozone Regulation: Implications of a New National Ambient Air Quality Standard for Ozone* 4 (Apr. 29, 2016).
[53] Texas Commission on Environmental Quality, Personal Communication (Oct. 4, 2016). *See also* Written Testimony of Rohit Sharma, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).

for nitrogen oxides did not trade in the Dallas area in the same time period, but offsets for volatile organic compounds traded for an average cost of $4,404 per ton.[54] In addition to these requirements, state implementation plans for bringing non-attainment areas into compliance with national standards can include increased inspection and maintenance requirements for vehicles,[55] as well as restrictions on speed limits,[56] vehicle use, barbecue pits, lawn care equipment, watercraft, off-road vehicles, sales and use of paints and aerosols, and vehicle idling.[57] The Clean Air Act also requires non-attainment areas to participate in the federal Transportation Conformity process, which denies federal highway funding to projects in non-attainment areas if the projects would undermine the local state implementation plan by contributing to increased emissions.[58] Taken together, all of these measures act as a significant drag on the economies of the non-attainment areas that become subject to them.[59]

The adverse economic effects that non-attainment areas normally experience are exacerbated by the 2015 ozone standard revisions, because the revisions lower the national standard so close to the "background level" of ozone that would be present without the activities of Texans that there is very little room left for emissions from Texans.[60] The EPA has admitted that the new standard is so low that some areas of the country will not be able to attain it using known control technologies.[61] As a result, witnesses testified before the Committee that the revisions to the ozone standard were likely to be the costliest of the new regulations Texas faces, and that they could become the costliest in the history of the EPA.[62] The TCEQ has estimated the cost of compliance in Texas to be between $4 and $54 billion and has expressed concern that compliance measures will involve major lifestyle changes for citizens living in non-attainment

[54] Texas Commission on Environmental Quality, Personal Communication (Oct. 4, 2016).
[55] Texas Commission on Environmental Quality, *Update on the 2015 Ozone Standard* 14 (Feb. 17, 2016).
[56] The 78th Texas Legislature enacted H.B. 1365 in 2003, which amended the Transportation Code to prohibit more environmental speed limits from being established by state agencies than were already in effect at the time the bill was passed. Accordingly, while speed limit adjustments are a strategy that can be incorporated into a state implementation plan, adding additional environmental speed limits in Texas would require legislative action. H.B. 1365, 78th Leg., Reg. Sess. (Tex. 2003).
[57] Texas Association of Business, *A State Perspective on Federal Ozone Regulation: Implications of a New National Ambient Air Quality Standard for Ozone* 5 (Apr. 29, 2016).
[58] U.S. Department of Transportation, *Transportation Conformity: A Basic Guide for State & Local Officials* 3 (2010).
[59] Texas Association of Business, *A State Perspective on Federal Ozone Regulation: Implications of a New National Ambient Air Quality Standard for Ozone* 4 (Apr. 29, 2016).
[60] On some hot days, the air entering Texas already contains ozone concentrations of around 65 ppb. Written and Oral Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016); Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[61] *See* Environmental Protection Agency, "Summary of the Updated Regulatory Impact Analysis (RIA) for the Reconsideration of the 2008 Ozone National Ambient Air Quality Standard (NAAQS)", at S5-1 ("As seen in the analysis presented in the 2008 ozone NAAQS RIA and the supplemental analysis presented in the body of the current update to that RIA, several areas cannot reach attainment by use of only known controls for our selected illustrative control strategy.").
[62] Written Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016); Written Testimony of Christina Wisdom, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).

areas.[63] The EPA has estimated the nationwide compliance cost to be much lower, only $3.9 billion, and the resulting health benefits to be between $7.5 and $15 billion.[64] However, the EPA's estimated cost assumes the use of technology that does not yet exist in areas where known control technologies cannot achieve attainment,[65] and the TCEQ has studied the purported health benefits independently and concluded that there will be little, if any.[66] The EPA's reliance on technology that does not yet exist to bring areas into attainment calls into question whether nationwide attainment of the new standard is even possible.[67]

Acting on the concerns discussed above, the State of Texas and the TCEQ joined a coalition of other states in filing a petition for review challenging the 2015 ozone standard revisions in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[68] A national coalition of industries filed a separate challenge in the same court.[69] The challengers argue that the EPA impermissibly failed to consider the impact of background ozone in issuing the revisions, that the EPA's broad interpretation of its authority to ignore background ozone usurps the authority of Congress, and that the EPA's evidence of adverse health effects being triggered by concentrations under 75 ppb was scientifically flawed.[70] As of the date of this Report, briefs have been filed, but the court has yet to schedule argument or rule on the case. The court has not stayed the implementation of the new ozone standards pending the litigation, so the State of Texas must comply with the revised standards unless and until the courts strike them down.[71]

C. National Ambient Air Quality Standards for Sulfur Dioxide

The EPA listed sulfur dioxide (SO_2) as a criteria pollutant under the Clean Air Act on April 30, 1971,[72] based on evidence that it can harm the respiratory system.[73] Sulfur dioxide contributes to acid rain and the formation of particulate matter,[74] which is another criteria

---

[63] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[64] *Id*.
[65] Written Testimony of Christina Wisdom, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[66] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[67] *See* Written Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[68] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[69] *See id*.
[70] Opening Brief of State Petitioners, *Murray Energy Corp. v. EPA*, No. 15-1385, 2, 15–18 (D.C. Cir., Apr. 22, 2016).
[71] Oral Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[72] 36 Fed. Reg. 8186 (Apr. 30, 1971).
[73] Environmental Protection Agency, *Sulfur Dioxide Basics*, available at: https://www.epa.gov/so2-pollution/sulfur-dioxide-basics#what%20is%20so2 (Oct. 2, 2016).
[74] *Id*.

pollutant in its own right.[75] The largest source of sulfur dioxide is the combustion of fossil fuels by power plants and industrial facilities.[76]

The EPA originally set the primary national ambient air quality standard for sulfur dioxide at an annual maximum of one twenty-four-hour average in excess of 140 ppb or an annual arithmetic average of 30 ppb.[77] That standard remained in place until 2010, when the EPA replaced it with a 75 ppb standard calculated by averaging the top one percent of daily maximum one-hour average concentrations over the previous three years.[78] The EPA's secondary standard for sulfur dioxide, a three-hour average of 500 ppb not to be exceeded more than once per year, has remained unchanged since 1971.[79]

After promulgating its new standard, the EPA initially designated as non-attainment only areas of the country that had air monitors located in them with design values in excess of the new standard, refusing to designate the rest of the country.[80] At that time, it did not designate any non-attainment areas in Texas.[81] The Sierra Club and the Natural Resources Defense Council (NRDC) subsequently sued the EPA in federal district court in San Francisco and in the D.C. Circuit, arguing that the Clean Air Act required the EPA to designate all areas of the country, regardless of whether they contained air monitors, by modeling the areas without monitors.[82] Texas and several other states intervened in both lawsuits, arguing that the EPA should have designated the areas with air monitors that had not exceeded the standard as being in attainment, while designating the areas without air monitors as unclassifiable, treating them as attainment areas without modeling them.[83] The suit in the D.C. Circuit was subsequently abated pending the outcome of the suit in district court.[84] On March 2, 2015, the San Francisco district court entered a consent decree under which the EPA settled with the Sierra Club and the NRDC by agreeing to designate unmonitored areas after gathering more data on those containing major

---

[75] 36 Fed. Reg. 8186 (Apr. 30, 1971).
[76] Environmental Protection Agency, *Sulfur Dioxide Basics*, available at: https://www.epa.gov/so2-pollution/sulfur-dioxide-basics#what%20is%20so2 (Oct. 2, 2016).
[77] Environmental Protection Agency, *Sulfur Dioxide (SO_2) Primary Standards – Table of Historical SO_2 NAAQS*, available at: https://www3.epa.gov/ttn/naaqs/standards/so2/s_so2_history.html (Oct. 2, 2016).
[78] 75 Fed. Reg. 35,520 (June 22, 2010).
[79] Environmental Protection Agency, *Sulfur Dioxide (SO_2) Primary Standards – Table of Historical SO_2 NAAQS*, available at: https://www3.epa.gov/ttn/naaqs/standards/so2/s_so2_history.html (Oct. 2, 2016). The secondary standard also originally included an alternative annual arithmetic average of 20 ppb, which was revoked in 2010. *Id.*
[80] Texas Commission on Environmental Quality, *2010 SO2 National Ambient Air Quality Standard* 2 (Feb. 10, 2016).
[81] *Id.*
[82] *See* Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016); Personal Communication with Steve Pier, Office of the Attorney General of Texas (Sept. 23, 2016).
[83] *See* Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016); Personal Communication with Steve Pier, Office of the Attorney General of Texas (Sept. 23, 2016).
[84] Personal Communication with Steve Pier, Office of the Attorney General of Texas (Sept. 23, 2016).

emissions sources.[85] The state intervenors did not agree to this course of action and have appealed the entry of the decree to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), where the parties are waiting on oral argument to be scheduled.[86] Meanwhile, a suit that Texas and several other states filed to resolve the same legal questions in North Dakota has been abated pending the outcome of the litigation in the Ninth Circuit.[87]

Under its consent decree, the EPA identified twelve unmonitored sources of sulfur dioxide in Texas that were large enough to present non-attainment issues on March 20, 2015.[88] The TCEQ submitted modeling and emissions data for eight of these sites that led the EPA to conclude on June 30, 2016, that seven did not present attainment concerns, but that one, the Harrington Station Power Plant in Potter County, needed to be modeled, monitored, or limited to less than 2,000 tons of sulfur dioxide emissions per year.[89] It delayed consideration of the other four until October 30, 2016. Those four sources are the Big Brown Steam Electric Station (Big Brown) in Freestone County, the Sandow Steam Electric Station in Milam County (Sandow), the Martin Lake Electrical Station (Martin Lake) in Rusk County, and the Monticello Steam Electric Station (Monticello) in Titus County.[90] Monticello, Martin Lake, and Big Brown are three of the State's largest coal-fired power plants.[91]

The EPA also issued a Data Requirements Rule (DRR) pursuant to its consent decree that requires states to address air quality for sulfur dioxide sources emitting more than 2,000 tons per year by modeling, monitoring, or establishing enforceable limits of less than 2,000 tons per year.[92] The DRR requires the State to begin operating all monitors it wishes to use to comply with this rule by January 1, 2017. If the State wishes to rely on models or emissions limits instead of monitors, these must be developed by January 13, 2017.[93] If the EPA designates new non-attainment areas as a result of the data obtained under this new rule, the State will have eighteen months to submit revisions to its state implementation plan and five years to bring the areas into attainment.[94]

The 84th Legislature appropriated $3.7 million and authorized the TCEQ to hire eight full-time employees to comply with the monitoring requirements of the sulfur dioxide consent

---

[85] *See* Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[86] *Id.*; Personal Communication with Steve Pier, Office of the Attorney General of Texas (Sept. 23, 2016).
[87] *See* Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[88] *Id.* at 1.
[89] *Id.* at 2; Texas Commission on Environmental Quality, *2010 SO2 National Ambient Air Quality Standard* 7 (Feb. 10, 2016).
[90] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[91] Testimony of Cyrus Reed, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[92] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[93] *Id.*
[94] *Id.*

decree.[95] This appropriation is sufficient to fund up to thirty-one new sulfur dioxide monitors in areas with significant emissions sources, but the TCEQ anticipates deploying only fourteen.[96]

The EPA estimated that implementing its revised sulfur dioxide standard would cost $1.5 billion nationwide and produce health benefits of between $15 and $37 billion.[97] However, the EPA's calculation of these benefit amounts depends primarily on the reductions in particulate matter that will result from the same measures that reduce sulfur dioxide emissions.[98] The EPA estimates that the direct benefit of the sulfur dioxide reductions its lower standard will produce is only $2.2 *million*.[99]

D. Cross-State Air Pollution Rule

The Clean Air Act contains a "good neighbor"[100] provision that requires every state to prohibit emissions that contribute significantly to maintenance problems or non-attainment of national ambient air quality standards in any other state.[101] In order to enforce compliance with this provision, the EPA promulgated the Clean Air Interstate Rule (CAIR) on May 12, 2005.[102] CAIR required twenty-nine upwind states, including Texas, to adopt and submit revisions to their state implementation plans to eliminate sulfur dioxide and nitrogen oxides emissions that were significantly contributing to non-attainment of the 1997 standards for particulate matter and ozone in downwind states.[103] The EPA finalized CAIR on April 26, 2006, and issued federal implementation plans to force the upwind states into a national cap-and-trade system pending adoption of satisfactory revisions to their state implementation plans.[104] However, the D.C. Circuit found that CAIR was unlawful on July 11, 2008, because it failed to link the reductions it required each upwind state to make to the magnitude of that state's contribution to air quality problems in downwind states.[105] The court ordered the EPA to draft a new rule to replace CAIR without the flaws identified in the court's opinion, but left CAIR in effect pending the issuance of the new rule.[106] Texas revised its state implementation plan to adhere to CAIR in February 2010.[107]

---

[95] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] 76 Fed. Reg. 48,216 (Aug. 8, 2011).
[101] 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2016).
[102] 70 Fed. Reg. 25,162 (May 12, 2005).
[103] 76 Fed. Reg. 48,217 (Aug. 8, 2011).
[104] *Id*.
[105] *North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir. 2008) (per curiam), *modified on reh'g*, 550 F.3d. 1176.
[106] *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).
[107] Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 3 (Feb. 19, 2016).

The EPA promulgated the Cross-State Air Pollution Rule (CSAPR) on August 8, 2011, to replace CAIR.[108] CSAPR applies to twenty-seven upwind states, including Texas.[109] Like CAIR before it, CSAPR is a federal implementation plan that the states have the option to replace with revisions to their state implementation plans.[110] CSAPR requires large electrical generating units (EGUs) in upwind states to participate in trading programs for annual sulfur dioxide and nitrogen oxides emissions, as well as ozone-season nitrogen oxides emissions.[111] Each upwind state receives emissions budgets that its power plants may meet in any way they see fit, including through unlimited trading of emissions allowances between plants in the same state.[112] While CSAPR also allows trading of emissions allowances between states, the interstate trading of allowances may not exceed specified limits.[113] The allowances a state receives in its budget are reduced incrementally over time to force the plants to gradually clean up their emissions.[114] CSAPR generally allocates emissions allowances among power plants by calculating the historic heat input for every plant in a state and then making each plant's share of the state's allowances equal to the plant's percentage share of the total heat input from plants in that state over the last three years.[115] However, in instances where this formula would allow a plant to exceed the maximum amount it emitted over the same three-year period, CSAPR sets the plant's allowances equal to the maximum amount it emitted over that timeframe.[116] States may submit limited state implementation plan revisions that change the EPA's default system of allocating allowances within their borders.[117]

The State of Texas challenged CSAPR in the D.C. Circuit in September 2011, arguing that the EPA had denied Texas meaningful notice and an opportunity to comment on the proposed rule, which prevented Texas from demonstrating that CSAPR required more reductions than were necessary to satisfy the good neighbor provision of the Clean Air Act.[118] Texas obtained a stay of the rule in December 2011 that delayed its implementation, leaving CAIR in place while the parties litigated the challenge to CSAPR.[119] In August 2012, the D.C. Circuit vacated CSAPR and ordered the EPA to replace it with a valid rule.[120] However, the United States Supreme Court reversed the D.C. Circuit in June 2014 and remanded the litigation for

---

[108] 76 Fed. Reg. 48,208 (Aug. 8, 2011).
[109] *Id.* at 48213.
[110] *Id*. at 48209.
[111] Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 1 (Feb. 19, 2016). "Ozone season" is the warmer months of the year.
[112] *Id*.
[113] *Id*.
[114] *Id*.; 76 Fed. Reg. 48,260 (Aug. 8, 2011).
[115] *Compare id. with* U.S. Environmental Protection Agency, *Allowance Allocation Final Rule TSD* 10 (June 2011).
[116] *Compare* Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 1 (Feb. 19, 2016) *with* U.S. Environmental Protection Agency, *Allowance Allocation Final Rule TSD* 10 (June 2011).
[117] *See* Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 2–3 (Feb. 19, 2016).
[118] Petitioner's Motion for Partial Stay of Final Rule, *Texas v. EPA*, No. 11-1338, at 10 (D.C. Cir. Sept. 22, 2011).
[119] Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 2–3 (Feb. 19, 2016).
[120] *Id.* at 4.

further proceedings, causing the D.C. Circuit to lift the stay in October 2014.[121] The D.C. Circuit held a second round of arguments on the remanded case in 2015 and found that the 2014 sulfur dioxide and ozone-season nitrogen oxides budgets for Texas were unlawfully strict.[122] The court remanded those budgets to the EPA for correction, but left CSAPR in effect pending publication of corrected budgets.[123]

In December 2015, the EPA published a proposed CSAPR Update Rule to help downwind states meet the 2008 ozone standards by lowering CSAPR's ozone-season budgets, which originally had been designed around the more lenient 1997 ozone and 2006 particulate matter standards.[124] This update rule also addressed the D.C. Circuit's remand of ozone-season nitrogen oxides budgets for Texas.[125] The CSAPR Update Rule did not address the D.C. Circuit's remand of annual sulfur dioxide budgets.[126]

Instead of addressing the remanded sulfur dioxide budgets in an updated rule, the EPA issued a memorandum in June 2016 offering Texas "a choice of one of two paths."[127] Under the first path, Texas can voluntarily submit a revision to its state implementation plan requiring its emissions sources to participate in CSAPR's annual trading program for sulfur dioxide without further objecting to its budget levels.[128] Under the second path, if Texas continues to object to its budget, the EPA will withdraw the federal implementation plan requiring Texas to participate in the annual nitrogen oxides and sulfur dioxide CSAPR programs and then address any remaining interstate transport or regional haze[129] obligations for the State on an individual basis.[130] If Texas chooses the second path, it will no longer be able to participate in CSAPR's interstate trading programs for annual nitrogen oxides or sulfur dioxide allowances.[131] Texas has until January 1, 2017, to make its decision.[132] As of the date of this Report, it has not been made.

The TCEQ has determined that the Texas power plants affected by CSAPR are currently meeting their budgets for all three CSAPR programs: annual sulfur dioxide, annual nitrogen oxides, and ozone-season nitrogen oxides.[133] There is currently a surplus of allowances in Texas

---

[121] Texas Commission on Environmental Quality, *Cross State Air Pollution Rule (CSAPR) in Texas* 4 (Feb. 19, 2016).
[122] *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015).
[123] *See id*.
[124] 80 Fed. Reg. 75,706 (Dec. 3, 2015).
[125] *Id*.
[126] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[127] Janet G. McCabe, *Memorandum* 1 (June 27, 2016).
[128] *Id*.
[129] A detailed discussion of Regional Haze is found in Subpart E of this Report, *infra*.
[130] *Id.* at 1–2.
[131] *See id.* at 4.
[132] Written Testimony of Mike Nasi, Senate Committee on Natural Resources and Economic Development 37 (Sept. 28, 2016).
[133] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).

for each budget, a portion of which can be carried forward into future years.[134] While the 2017 ozone-season budget is 5.6% less than the actual ozone-season emissions recorded in 2015, the TCEQ does not anticipate that Texas plants will have trouble complying with it.[135] However, whether Texas continues to participate in CSAPR's sulfur dioxide program could have a significant effect on the cost of complying with the EPA's regional haze rules.

E. Regional Haze

The Clean Air Act instructs the EPA to improve visibility in national parks and wilderness areas by requiring the states to include measures in their implementation plans to reduce pollution that impairs visibility.[136] Although Congress enacted the amendments requiring this action in 1977, and the EPA promulgated limited regulations in 1980, the EPA did not publish comprehensive regulations to address the issue until 1999, after it had studied the issue extensively and concluded that the primary pollutants reducing visibility were particulate matter formed from sulfur dioxide and nitrogen oxides.[137] The EPA's regional haze regulations seek to reach conditions of natural visibility in national parks and wilderness areas by 2064.[138] One of the key components of the 1999 regional haze regulations forced states to require older sources of pollution that impaired visibility either to implement Best Available Retrofit Technology (BART) or participate in a statewide trading program that resulted in cleaner air than BART would.[139] Another key component of the regulations requires states to demonstrate "reasonable progress" toward reaching the goal of natural visibility.[140]

What constitutes BART under the EPA's regulations varies from source to source, depending on several factors, including the existing control technology in place at the source, the costs of compliance, energy and non-air environmental impacts of compliance, the remaining useful life of the source, and the degree of visibility improvement that is reasonably anticipated from the use of the technology.[141] The D.C. Circuit vacated the 1999 regulations' BART provisions in 2002 because it found they impermissibly forced states to impose BART controls on sources that had not been shown to contribute to visibility problems.[142] The EPA published a final rule three years later amending its Regional Haze regulations to fix the problems with

---

[134] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[135] *Id*.
[136] 42 U.S.C. §§ 7472, 7491 (2016).
[137] Environmental Protection Agency, *Fact Sheet: Final Regional Haze Regulations for Protection of Visibility in National Parks and Wilderness Areas* 1–3 (June 2, 1999).
[138] 40 C.F.R. § 51.308.
[139] Environmental Protection Agency, *Fact Sheet: Final Regional Haze Regulations for Protection of Visibility in National Parks and Wilderness Areas* 5 (June 2, 1999).
[140] 40 C.F.R. § 51.308(d)(1).
[141] Environmental Protection Agency, *Fact Sheet: Final Regional Haze Regulations for Protection of Visibility in National Parks and Wilderness Areas* 5 (June 2, 1999).
[142] *Am. Corn Growers Assoc. v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002) (per curiam).

BART that the D.C. Circuit had identified.[143] This rule also stated that, in lieu of conducting a BART analysis on electrical generating units, states could rely on compliance with CAIR, because CAIR was designed to achieve greater reductions in the same particulate matter and ozone precursors that impair visibility that BART addressed.[144] The rule ordered states to submit implementation plan revisions in accordance with its provisions by December 2007.[145]

Thirty-seven states, including Texas, subsequently missed the deadline to submit their revisions due to uncertainty surrounding the CAIR litigation.[146] In January 2009, the EPA gave these states two years to submit conforming revisions before it would impose a federal implementation plan.[147] Texas submitted its revisions two months later, relying on compliance with CAIR instead of BART to satisfy its electrical generating units' obligations under the Regional Haze rule.[148] The State's plan proposed goals of reaching natural visibility in Big Bend by 2155 and the Guadalupe Mountains by 2081.[149] The EPA waited five and a half years to take any action, ultimately proposing disapproval of portions of Texas's state implementation plan revisions in December 2014, finding that they did not sufficiently protect Big Bend, the Guadalupe Mountains, or the Wichita Mountains in Oklahoma.[150] The EPA instead proposed a federal implementation plan that would substitute Texas's reliance on CAIR with CSAPR,[151] a program that had not existed at the time the EPA demanded Texas submit its revisions and that was still on remand in the D.C. Circuit. However, the EPA did not finalize its disapproval of Texas's plan until January 2016.[152] By that time, the State's legal challenges to CSAPR had made its future uncertain. Accordingly, when the EPA disapproved Texas's plan in January 2016, its final federal implementation plan for regional haze did not allow Texas to substitute reliance on CAIR or CSAPR to satisfy BART.[153] Instead, it required additional controls or limitations on fifteen units at eight sites in Texas to meet the State's reasonable progress requirement.[154] Texas challenged the EPA's federal implementation plan in the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) in February 2016, and the Fifth Circuit stayed its implementation in July 2016.[155] That stay is still in effect as of the date of this Report, and no action will be required by any Texas pollution source until it is lifted. The EPA is under

[143] 70 Fed. Reg. 39,104 (July 6, 2005).
[144] *Id*. at 39136–37.
[145] *Id*. at 39156.
[146] *See* 74 Fed. Reg. 2392 (Jan. 15, 2009).
[147] *Id*.
[148] *See* 79 Fed. Reg. 74,818 (Dec. 16, 2014).
[149] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *See id*.
[154] Texas Commission on Environmental Quality, Personal Communication (Oct. 17, 2016).
[155] *Texas v. EPA*, 829 F.3d 405 (5th Cir. July 15, 2016).

a separate court-ordered deadline to propose a BART federal implementation plan for Texas by December 9, 2016, to be finalized by September 9, 2017.[156]

As discussed above in the context of CSAPR, the EPA issued a memorandum in June 2016 offering Texas a choice between voluntarily adopting CSAPR's sulfur dioxide budgets or having its electrical generating units analyzed on an individual basis without the benefit of the trading programs created by CSAPR.[157] Accordingly, regardless of what happens in the Fifth Circuit reasonable progress case, if the State does not voluntarily comply with CSAPR, the Regional Haze rule will require its power plants to undergo a case-by-case BART analysis.

The revisions Texas proposed to its state implementation plan to comply with the federal Regional Haze regulations would not have required any additional control measures by pollution sources in Texas beyond those they are already taking to comply with other air quality programs.[158] As mentioned above, the federal implementation plan the EPA proposed would impose sulfur dioxide limits that would require action by eight coal-fired power plants: Big Brown, the Coleto Creek Power Station in Goliad County, the Limestone Generating Station in Limestone County, Martin Lake, Monticello, Sandow, the Tolk Generating Station in Lamb County, and the San Miguel Electric Cooperative in Atascosa County.[159] The EPA has estimated that the additional upgrades to these plants required by the federal implementation plan would cost $2 billion.

Regional Haze pollutant reduction goals are stated in terms of deciviews instead of parts-per-billion.[160] Generally, 1.0 deciview is the change in visibility that a person can detect with the naked eye.[161] In exchange for the aforementioned $2 billion in extra costs, the EPA estimates that its plan will result in deciview improvements over the Texas plan of 0.45 in the Wichita Mountains, 0.12 in Big Bend, and 0.15 in the Guadalupe Mountains.[162]

F. Mercury and Air Toxics Standards

When Congress amended the Clean Air Act to create national ambient air quality standards for criteria pollutants in 1970, it also created National Emission Standards for Hazardous Air Pollutants (NESHAP).[163] It defined "hazardous air pollutant" as "an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator [of the EPA] may cause, or contribute to, an increase in mortality or an increase in

[156] Texas Commission on Environmental Quality, Personal Communication (Oct. 17, 2016).
[157] Janet G. McCabe, *Memorandum* 1 (June 27, 2016).
[158] Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[159] *Id*.
[160] *Id*. at 2.
[161] *Id*.
[162] *Id*.
[163] P.L. 91-604, 84 Stat. 1678–86 (Dec. 31, 1970).

serious irreversible, or incapacitating reversible, illness."[164] The difference between criteria pollutants and hazardous air pollutants is not only the acuity of their health effects, but also the Clean Air Act's specification that the presence of criteria pollutants "in the ambient air results from numerous or diverse mobile or stationary sources."[165] The implication is that criteria pollutants are more widespread and pose a less specific risk to a larger portion of the general population, while hazardous air pollutants may be local to a small number of sources threatening severe injury to primarily their surrounding populations.[166] While the EPA regulates criteria pollutants through standards that limit their concentrations in the ambient air, it regulates hazardous air pollutants with standards that limit their release or emissions.[167]

Over the eighteen years after the 1970 Clean Air Act amendments, the EPA listed eight hazardous air pollutants and established emissions standards for only seven of them.[168] Concerned about the EPA's slow pace, Congress amended the Clean Air Act again in 1990 to remove much of the EPA's discretion and require regulation of more than a hundred specific hazardous air pollutants, including mercury and nickel.[169] Under the new statutory scheme, Congress required the EPA to categorize major sources and area sources of the listed hazardous air pollutants and then regulate them on a prioritized schedule that reflected the maximum reduction in emissions which could be achieved by application of the best available control technology.[170] The amendments required new sources to adopt emissions controls that achieved, at a minimum, the level of emissions produced in practice by the best-controlled similar source.[171] They required existing sources to adopt emissions controls equal to the average emissions limitations achieved by the best performing twelve percent of existing sources.[172] The EPA collectively refers to the controls that meet these benchmarks for new and existing sources as "Maximum Achievable Control Technology" (MACT).[173] The amendments also instructed the EPA to perform a study of the hazards to public health reasonably anticipated to occur as a result of hazardous air pollutant emissions from electrical generating units.[174] The EPA was to regulate those units if it found that doing so was appropriate and necessary after considering the results of the study.[175]

---

[164] P.L. 91-604, 84 Stat. 1678–86 (Dec. 31, 1970).
[165] Committee on Air Quality Management in the United States, Board on Environmental Studies and Toxicology, Board on Atmospheric Sciences and Climate, Division on Earth and Life Sciences, & National Research Council, AIR QUALITY MANAGEMENT IN THE UNITED STATES 46 (2004).
[166] *Id*.
[167] *Id*.
[168] *State of New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), *cert. dism'd*, 555 U.S. 1162 (2009).
[169] *State of New Jersey*, 517 F.3d at 578.
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] 77 Fed. Reg. 9307 (Feb. 16, 2012).
[174] *State of New Jersey*, 517 F.3d at 579.
[175] *Id*.

Although Congress had ordered the EPA to complete its study within three years of the 1990 amendments, the EPA did not complete the task until 1998.[176] In December 2000, the EPA issued findings that electrical generating units were the largest domestic sources of mercury emissions and that they presented significant hazards to the public health and the environment.[177] The agency followed this finding with two proposed alternative rules in January 2004.[178] One alternative proposed regulating the generating units through maximum achievable control technology or a cap-and-trade system.[179] The second alternative proposed removing the generating units from the list of hazardous air pollutant sources and instead regulating them with performance standards under a different statutory approach.[180] After public comment, the EPA chose the second alternative, which it promulgated as the Clean Air Mercury Rule (CAMR) in 2005.[181]

A coalition of states and environmental activists petitioned the D.C. Circuit to overturn CAMR shortly after the EPA promulgated it, arguing that the EPA's removal of generating units from the list of hazardous air pollutant sources under the Clean Air Act was unlawful.[182] The D.C. Circuit agreed and vacated the rule in 2008.[183] A different coalition then sued the EPA again to force it to issue a replacement rule regulating hazardous air pollutants from generating units.[184] The EPA entered into a consent decree agreeing to do so by the end of 2011.[185]

The EPA proposed a rule to replace CAMR in May 2011, which it ultimately published in February 2012 as the Mercury and Air Toxics Standards (MATS) for power plants.[186] Unlike CAMR, MATS regulates electrical generating units as hazardous air pollution sources and requires them to meet standards reflecting the application of maximum available control technology.[187] MATS established limits for mercury, antimony, arsenic, beryllium, cadmium, chromium, cobalt lead, manganese, nickel, selenium, and acid gasses.[188] The regulation also allowed some specified limits to be met by controlling particulate matter, sulfur dioxide, and hydrogen chloride as surrogates for controls on the air toxics themselves.[189] The limits varied depending on the generating unit's fuel type, design, and date of construction.[190]

---

[176] *State of New Jersey*, 517 F.3d at 579.
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id.* at 579–80.
[181] *Id.* at 580.
[182] *Id.* at 581.
[183] *Id*.
[184] 77 Fed. Reg. 9308 (Feb. 16, 2012).
[185] *Id*.
[186] *Id.* at 9306.
[187] *Id.* at 9304, 9307.
[188] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[189] *Id*.
[190] *Id*.

The EPA estimated that the limits MATS imposed on power plants would cost those plants $9.6 billion per year and result in a direct public health benefit of between $4 and 6 *million* per year.[191] The agency refused to consider this cost-benefit imbalance in deciding whether it was appropriate and necessary to regulate the plants, and a resulting legal challenge by Texas and twenty-two other states eventually made is way to the U.S. Supreme Court.[192] The Supreme Court held that, while the Clean Air Act did not prohibit the EPA from issuing a regulation that cost more than it produced in benefits, the EPA's refusal to consider the cost at all was unlawful.[193] Accordingly, it remanded MATS to the D.C. Circuit, which remanded the regulation to the EPA to reconsider in light of the Court's ruling.[194] The D.C. Circuit's remand did not vacate MATS,[195] meaning it remained in effect pending the EPA's reconsideration.

The EPA published an updated rule in response to the Supreme Court's remand on April 25, 2016. Fifteen states, including Texas, have challenged this updated rule in the D.C. Circuit, arguing that it still imposes expenses on power plants that unreasonably and vastly outweigh the benefits of the reductions in pollution they will produce.[196] The challenge remains pending in the D.C. Circuit as of the date of this Report.

Although the Supreme Court declared MATS unlawful in 2015, no court ever stayed or vacated it. Accordingly, it has been in effect since 2012, and Texas power plants subject to its provisions were required to comply with it by April 2016.[197] According to the TCEQ, all Texas plants are in compliance as of the date of this Report.[198]

G. Clean Power Plan

In between the 1970 amendments to the Clean Air Act that regulated criteria pollutants and hazardous air pollutants, Congress inserted Section 111[199] to perform two functions.[200] The first was to empower the EPA to set national standards of performance for new stationary sources of pollution.[201] Congress gave this power to the EPA because new sources that had yet to be built were more accommodating subjects for uniform federal regulation than the thousands of existing sources with different ages, different designs, and different economics. Congress

---

[191] *Michigan v. EPA*, 135 S. Ct. 2699, 2705–06 (2015).
[192] *Id.* at 2706.
[193] *Id.* at 2711.
[194] *Id.* at 2712; *White Stallion Energy Ctr., LLC v. EPA*, 2015 U.S. App. LEXIS 21819, No. 12-1100, at *56 (D.C. Cir. Dec. 15, 2015) (per curiam), *cert. denied*, 136 S. Ct. 2463 (2016).
[195] *Id*.
[196] *See* Petitioners' Non-Binding Statement of Issues to be Raised, *Michigan, et al. v. EPA*, Case No. 16-1204, at 1–3 (D.C. Cir. Jul. 29, 2016).
[197] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[198] *Id*.
[199] 42 U.S.C. § 7411 (2016).
[200] *See* P.L. 91-604, 84 Stat. 1678–86 (Dec. 31, 1970).
[201] 42 U.S.C. § 7411(a)–(b) (2016).

assigned primary responsibility for cleaning up existing stationary sources to the states,[202] due to the complexity involved. The second function that Section 111 performs is to fill a gap by empowering the EPA to regulate new stationary sources of pollutants that endanger the public health or welfare but neither qualify as criteria pollutants nor as hazardous air pollutants.[203] In cases where the EPA fills this gap for new sources, Section 111(d) empowers it to order the states to fill the same gap for existing sources by revising their state implementation plans to impose similar standards of performance.[204]

Section 111 defines "standard of performance", the keystone of its regulation of both new and existing sources, as follows:

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.[205]

There is no further statutory definition of "best system of emission reduction" (BSER) other than that shown above, leaving considerable discretion to the Administrator of the EPA.[206]

Between 1970 and 2015, the EPA primarily used Section 111 to promulgate new source performance standards (NSPS) for new sources of criteria and hazardous air pollutants, issuing regulations for more than sixty categories of such sources.[207] Over that same time period, the EPA ordered states to regulate sources with emissions that were neither criteria nor hazardous air pollutants only five times under Section 111(d).[208] All of the performance standards issued by the EPA under Section 111 before 2015 applied to individual sources and could be implemented at each source.[209]

Carbon dioxide is neither a criteria pollutant nor a hazardous air pollutant, but the EPA opened the door to regulating it by finding that it endangered the public health and welfare in 2009.[210] In October 2015, the EPA issued new source performance standards for coal and natural gas electrical generating units to control their carbon dioxide emissions.[211] It determined

---

[202] *See* 42 U.S.C. §§ 7410, 7412 (2016).
[203] *See* 42 U.S.C. § 7411 (2016).
[204] *Id.* at § 7411(d).
[205] *Id.* at § 7411(a)(1).
[206] *See* 80 Fed. Reg. 64,700 (Oct. 23, 2015).
[207] *Id.* at 64702.
[208] *Id.* at 64703. These regulations addressed five categories of sources for acid mist, fluorides, total reduced sulfur, and landfill gasses. *Id*.
[209] Opening Brief of Petitioners on Core Legal Issues, *West Virginia, et al. v. EPA, et al.*, Case No. 15-1363, at *8 (D.C. Cir. Feb. 19, 2016) (citing 40 C.F.R. pt. 60, subpts. Cb–OOOO).
[210] 74 Fed. Reg. 66,496–99 (Dec. 15, 2009).
[211] 80 Fed. Reg. 64,510 (Oct. 23, 2015).

that the best system of emission reduction for new coal plants was partial carbon capture and sequestration technology, which resulted in a performance standard of 1,400 pounds of carbon dioxide per megawatt-hour (lbs CO_2/MWh), while the best system of emission reduction for reconstructed plants, which Section 111 also treats as new, was improved operational efficiencies resulting in between 1,800 and 2,000 lbs CO_2/MWh, depending on the plant.[212] For gas plants, it concluded that the best system of emission reduction was combined cycle technology resulting in a new source performance standard of 1,000 lbs CO_2/MWh.[213]

On the same day it laid the groundwork with these new source performance standards, the EPA launched its main offensive against carbon dioxide emissions by issuing the Clean Power Plan, which requires states to regulate existing coal and gas plants under Section 111(d).[214] The Clean Power Plan defines the best system of emission reduction for carbon dioxide from coal and gas fired plants as a three-part strategy of: (1) improving operational efficiencies of coal plants, (2) substituting generation from low-emitting combined cycle gas plants for generation from both coal and gas plants that use steam turbines, and (3) substituting zero-emission generation from renewable energy for generation from fossil fuel plants.[215] In other words, the EPA's best system of emission reduction for coal and gas plants is to stop using them. In order to implement this system, it sets performance standards for existing steam-driven plants at 1,305 lbs CO_2/MWh and existing combined cycle gas plants at 771 lbs CO_2/MWh.[216] Both of these numbers are lower than the performance standards for new plants of both types, and the EPA concedes that it is impossible for a plant to achieve either with current technology.[217] Instead, plants will have to achieve these performance standards by subtracting emission rate credits from their actual emissions.[218] Emission rate credits are tradable compliance instruments representing one megawatt of energy either saved or generated from certain lower-emitting sources.[219]

As a Section 111(d) rule, the Clean Power Plan must be implemented primarily by the states. Under the Plan's terms, each state has two alternatives. The first is to establish carbon dioxide emission standards for its existing coal and gas plants that require each plant to individually meet the emissions performance rates described above by producing or buying emission rate credits.[220] The second alternative is for the state to impose a requirement that the total emissions from its regulated sources collectively meet a statewide goal assigned to the state by the EPA that is derived from the performance rates for all regulated plants within that state.[221]

---

[212] 80 Fed. Reg. 64,512–13 (Oct. 23, 2015).
[213] *Id*.
[214] *See* 80 Fed. Reg. 64,661–5120 (Oct. 23, 2015).
[215] *Id.* at 64,667.
[216] *Id*.
[217] *Id.* at 64,754.
[218] 40 C.F.R. § 60.5790(c)(1).
[219] *Id.* at §§ 60.5880, 60.5790(c), 60.5795(a).
[220] *Id.* at § 60.5855(a).
[221] *Id.* at § 60.5855(b).

Under the latter approach, the EPA publishes the statewide goal in both rate-based terms, meaning the average number of pounds of carbon dioxide per megawatt-hour that all regulated sources in the state can collectively emit, and mass-based terms, meaning the total tons of carbon dioxide that the regulated sources in state can emit in the aggregate.[222] States electing to impose mass-based collective standards can only obtain emission rate credits from zero-emission renewable sources.[223] They receive no benefit from nuclear, biomass, waste-to-energy, or combined-heat-and-power generation or demand-side energy efficiency measures, unlike states that set rate-based statewide goals.[224] Regardless of whether a state imposes individual performance standards, collective rate-based standards, or collective mass-based standards, only renewable generation built after January 1, 2013, can be used to generate emission rate credits.[225] This provision excludes at least 12,214 megawatts of zero-emission renewable generation in Texas from producing emission rate credits.[226]

The Clean Power Plan was designed to reduce carbon emissions from the power industry by thirty-two percent from 2005 to 2030.[227] Under the rate-based collective approach, Texas would have to lower its 2012 rate of 1566 lbs CO_2/MWh to 1,042 lbs CO_2/MWh by 2030.[228] Under the mass-based collective approach, it would have to reduce annual emissions from 240.7 million short tons per year in 2012 to 189.6 million in 2030.[229] The EPA assumed that most states would choose one of the two collective approaches in estimating the nationwide costs of the Clean Power Plan.[230] It estimated that the nationwide cost under the rate-based approach would be $2.5 billion in 2020, $1 billion in 2025, and $8.4 billion in 2030.[231] It estimated that compliance with the mass-based approach would cost $1.4 billion in 2020, $3 billion in 2025, and $5.1 billion in 2030.[232]

Advocates of the Clean Power Plan assert that Texas will avoid most of these costs if current trends in its electricity market continue.[233] They argue that, even if the EPA had never promulgated the Plan, the rapid deployment of new solar and wind generation in Texas, combined with increasing energy efficiency, will cause Texas to exceed its collective rate-based

---

[222] 40 C.F.R. § 60.5855(b).
[223] *Id.* at § 60.5800(a).
[224] *See id*.
[225] *Id*.
[226] American Wind Energy Association, *AWEA U.S. Wind Industry Annual Market Report: Year Ending 2012* 14, available at: http://awea.files.cms-plus.com/images/AWEA_USWindIndustryAnnualMarketReport2012_ExecutiveSummary(2).pdf (Oct. 13, 2016).
[227] 80 Fed. Reg. 64,665 (Oct. 23, 2015).
[228] Environmental Protection Agency, *Clean Power Plan: State at a Glance: Texas* 1, available at: https://www3.epa.gov/airquality/cpptoolbox/texas.pdf (Oct. 6, 2016).
[229] *Id*.
[230] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[231] *Id*.
[232] *Id*.
[233] Written Testimony of John Hall, Senate Committee on Natural Resources and Economic Development 6–7 (Sept. 28, 2016).

goals by 2030 without an increase in cost to ratepayers.[234] However, Texas regulators are not as optimistic. According to an analysis performed by the Electric Reliability Council of Texas (ERCOT) in October 2015, the Clean Power Plan could result in the retirement of at least 4,000 megawatts of coal generation capacity in ERCOT, which could result in periods of reduced system-wide resource adequacy and local transmission reliability problems.[235] ERCOT concluded that costs for customers could rise by as much as sixteen percent by 2030 without accounting for the costs of transmission upgrades, higher natural gas prices, procurement of additional ancillary services, and costs associated with retiring coal-fired capacity.[236] The Public Utilities Commission has expressed concern that large coal plant retirements could substantially increase transmission costs, because much of the State's electrical grid was designed and built around them.[237]

Texas joined a coalition of more than half the states challenging the legality of the Clean Power Plan's unprecedented use of Section 111(d) to create performance standards for existing sources that are not only more stringent than those for new sources, but also impossible to achieve with current technology and based on a system of emission reduction that replaces existing sources instead of upgrading them.[238] In an unprecedented move, the Supreme Court stayed the Clean Power Plan on February 9, 2016, after the D.C. Circuit had declined to do so.[239] The parties subsequently argued the merits of the suit before the D.C. Circuit sitting *en banc* on September 27, 2016,[240] but the court has not published its decision as of the date of this Report. All Texas agencies ceased working on compliance issues when the Supreme Court issued its stay, and none will resume until the legal challenge is resolved.[241]

H. New Source Performance Standards for Oilfield Methane and VOCs

The EPA issued an endangerment finding for methane at the same time it found carbon dioxide and other greenhouse gasses endangered the public health and welfare.[242] On June 3, 2016, it published a finding that the oil and gas industry was the second-largest emitter of greenhouse gasses from stationary sources, the largest being the electrical generating industry.[243] Accordingly, it issued final rules creating new source performance standards under Section 111

---

[234] Written Testimony of John Hall, Senate Committee on Natural Resources and Economic Development 6–7 (Sept. 28, 2016).
[235] *Id*.
[236] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[237] Testimony of Brian Lloyd, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[238] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[239] *See West Virginia v. EPA*, 136 S. Ct. 1000 (Feb. 9, 2016).
[240] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[241] *Id.* at 1.
[242] 74 Fed. Reg. 66,497 (Dec. 15, 2009).
[243] 81 Fed. Reg. 35,830 (June 3, 2016).

of the Clean Air Act designed to reduce emissions of methane and volatile organic compounds from midstream and upstream sources built, modified, or reconstructed after September 18, 2015.[244] The EPA states that methane is between twenty-eight and thirty-six times more potent than carbon dioxide at retaining atmospheric heat.[245]

The EPA's new source performance standards require sources to use specified control devices and practices to reduce emissions from certain oilfield equipment like pneumatic pumps and compressors by ninety-five percent.[246] They also impose fugitive emission leak detection and repair (LDAR) requirements that apply to well sites and compressor stations.[247] The new leak detection and repair requirements mandate quarterly inspections at compressor stations and semi-annual inspections at well sites, both of which must be performed with either optical gas imaging (OGI) equipment or the EPA's Method 21, a labor-intensive, time-consuming monitoring process performed with a portable instrument that detects much smaller leaks than most OGI cameras.[248] Operators generally must repair leaks within thirty days of discovery, unless the repair would require shutting down the station, in which case they may perform the repair at the next scheduled shutdown or within two years.[249] The operator must then perform a follow-up inspection within thirty days to confirm that the repair worked.[250] New source performance standards issued in 2012 already required "green completions" of gas wells, a process intended to minimize the amount of gas vented during completions by capturing or combusting the gas at the wellhead.[251] The EPA's latest new source performance standards require that new oil wells use the green completion technique as well.[252] Hydraulic fracturing or re-fracturing an existing well site after September 18, 2015, constitutes a modification under these new rules and will make it subject to all of the new source performance standards discussed above.[253] The EPA did not include a proposed exemption for marginal wells in its final rules, because it found that they tend to emit the same amounts as more profitable wells.[254]

The EPA's proposed version of the new source performance standards for oilfield methane included a mandatory aggregation provision that would have treated all facilities within a quarter-mile of each other or which shared common facilities outside of the quarter-mile as a single source, potentially triggering heightened emission standards. [255] However, the EPA's final rule ultimately aggregates only sources that are both connected and within a quarter mile

[244] 81 Fed. Reg. 35,824 (June 3, 2016). *See* Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 1–2 (May 18, 2016).
[245] 81 Fed. Reg. 35,830 (June 3, 2016).
[246] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 3 (May 18, 2016).
[247] *Id.* at 4.
[248] *Id*. at 4, 8–9.
[249] *Id*.
[250] *Id.* at 4, 8–9.
[251] 40 C.F.R. part 60, subpart OOOO.
[252] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 7 (May 18, 2016).
[253] *Id.* at 8.
[254] 81 Fed. Reg. 35,891 (June 3, 2016).
[255] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 14 (May 18, 2016).

radius.[256] This aggregation rule only applies to permitting programs administered directly by the EPA, not to states like Texas, where state agencies administer permitting programs approved by the EPA.[257]

The EPA estimated that its new source performance standards for methane would affect 13,000 oil wells and 94,000 well pads,[258] causing the operators of affected facilities to incur a total cost of $640 million by 2025 to produce climate benefits of $690 million.[259] The EPA predicted that the cost would be further offset by sales of $110 million worth of gas that otherwise would have leaked into the atmosphere.[260] However, the EPA's prediction valued this gas at $4.00 per thousand cubic feet (Mcf),[261] a price that would cause many in the industry to leap for joy as of the date of this Report. Additionally, the TCEQ believes that the EPA substantially underestimated both the number of potentially affected sources and the overall fiscal impact and regulatory burden of the rule on operators.[262]

The oil and gas industry is particularly concerned about the effect the cost of leak detection and monitoring will have on the marginal wells that account for approximately twenty percent of Texas's production.[263] While existing wells are not initially covered under the new source performance standards, they can become covered if they are re-fractured, and all new wells will eventually become marginal.[264] At the Committee's hearing on this issue, one industry representative testified that optical gas imaging cameras cost $80,000 apiece and that the training for them costs an additional $40,000.[265] The same witness testified that third party contractors charge $700 per well and $1,000 per production facility for inspections.[266] An advocate of the new standards contested these third-party inspection costs, quoting a lower price of $250 per inspection.[267] The same witness noted that industry has accommodated similar, if not more comprehensive, rulemakings by state authorities in Colorado, Ohio, and Wyoming.[268] However, expenses at any price point factor into well economics. Operators produce wells only so long as they are capable of producing in paying quantities, meaning the well produces more

[256] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 14 (May 18, 2016).
[257] *Id*.
[258] *Id*.
[259] *See* 81 Fed. Reg. 35,827, 35,886.
[260] *See id*. (subtracting $110 million from the $640 million in engineering costs to produce a net engineering cost of $530 million).
[261] *Id*.
[262] Written Testimony of Steve Hagle, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[263] *See* Testimonies of Todd Staples, Ed Longanecker, & John Tintera, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[264] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 8 (May 18, 2016); Written Testimony of John Tintera, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[265] *Id*.
[266] *Id*.
[267] Written Testimony of Colin Leyden, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[268] *Id*.

revenue from the sales of its hydrocarbons than it costs to keep it running. The EPA's new source performance standards accelerate the date at which new and modified wells will no longer be capable of producing in paying quantities by adding fixed expenses to their day-to-day operations. In the long term, this will cause operators to shut wells in earlier, leading to less revenue for operators, less royalty income for mineral owners, and less tax revenue for the State.

The industry also contests that the EPA's measures will lead to noticeably lower emissions, noting that methane emissions have decreased 14.8% since 1990 despite a huge increase in production over the same timeframe.[269] One representative warned that making natural gas more expensive to produce could hamper the EPA's attempts to fight greenhouse gas emissions in other industries.[270] Advocates for the measure disagree, arguing that the oil and gas sector accounts for 33% of methane emissions in the U.S., most of them from a handful of poorly-run sites.[271]

The State of Texas filed a petition challenging the new source performance standards for methane and volatile organic compounds in the D.C. Circuit after they were promulgated, arguing that the EPA failed to make findings that were necessary predicates and used a fundamentally flawed cost-benefit analysis.[272] The case has not yet been briefed and remains pending as of the date of this Report.

At the same time the EPA issued its final rule for new sources, it issued a proposed Information Collection Request (ICR) to support the development of new rules to regulate methane emissions from *existing* sources.[273] When finalized, the information collection request will be a mandatory survey sent to operators of existing sources to gather data the EPA believes it needs in order to craft performance standards for existing sources.[274] After it develops the performance standards, it will order the states to implement them under Section 111(d), just as it did with the Clean Power Plan.[275]

[269] Written Testimony of John Tintera, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[270] *See* Written Testimony of Todd Staples, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[271] *See* Written Testimony of Colin Leyden, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[272] Petitioners' Non-Binding Statement of Issues, *State of Texas, et al. v. EPA, et al.*, No. 16-1257, at 1–2 (D.C. Cir. Aug. 29, 2016).
[273] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 12 (May 18, 2016).
[274] Vinson & Elkins LLP, *A New Slew of Oil and Gas Regulations: What You Need to Know* 12 (May 18, 2016).
[275] *See id*.

I. Start-Up, Shutdown, and Malfunction State Implementation Plan Call

The EPA and the states derive many of the emissions standards prescribed by the Clean Air Act and state implementation plans from the capabilities of available control technologies.[276] But control technologies do not always work at steady rates. Emission control equipment can require certain temperatures to operate or certain flow levels to minimize safety risks.[277] These optimal conditions can be impossible to attain when a plant is starting up or shutting down.[278] Malfunctions, which the EPA defines as sudden and unavoidable failures of process or control equipment,[279] compound these problems and introduce new variables depending on the nature of each malfunction.[280] Accordingly, the courts have interpreted the various levels of control technology prescribed by the Clean Air Act to accommodate these unavoidable periods of increased emissions.[281] Similarly, state implementation plans dealt with the issue for decades by excluding or exempting start-up, shut-down, and malfunction (SSM) events from generally-applicable standards or by providing affirmative defenses to charges that emission limits were exceeded during an SSM event.[282] While these exemptions and affirmative defenses could allow an individual source to avoid charges of violating a pollution allowance, they could not be used by a state to argue for lower readings on the monitors that determine attainment with national ambient air quality standards.[283] In other words, they did not affect the actual emissions inventories reported by the states to the EPA.[284]

In 1982 and again in 1999, the EPA issued non-binding guidance documents expressing concern that some states' SSM policies were too lenient.[285] The 1999 document stated that the EPA would not approve future state implementation plan revisions that contained any automatic exemptions from emission limitations for SSM or any provisions which authorized state regulatory officials to grant exemptions for SSM.[286] However, it advised that the EPA would

[276] *See, e.g.*, 42 U.S.C. §§ 7412, 7502 (2016) (regulating sources of criteria pollutants and hazardous air pollutants by referring to "best available control technology", "maximum achievable control technology", and "reasonably available control technology").
[277] *E.g.*, 79 Fed. Reg. 75,622, 75,647 (Dec. 18, 2014) (describing issues with control equipment during start-up and shutdown of brick kilns); 80 Fed. Reg. 3090, 3095 (Jan. 21, 2015) (describing safety and corrosion problems when control devices are engaged during boiler start-up).
[278] *See* 79 Fed. Reg. 75,622, 75,647 (Dec. 18, 2014) (describing issues with control equipment during start-up and shutdown of brick kilns); 80 Fed. Reg. 3090, 3095 (Jan. 21, 2015) (describing safety and corrosion problems when control devices are engaged during boiler start-up).
[279] 80 Fed. Reg. 33,977 (June 12, 2015).
[280] *See, e.g.*, 79 Fed. Reg. 36,880 (June 30, 2014).
[281] *E.g.*, *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1293, 1302 n.35 (9th Cir. 1977).
[282] Brief of Industry Petitioners, *Walter Coke, Inc., et al. v. EPA*, No. 15-1166, at *7–8 (D.C. Cir. Mar. 16, 2016).
[283] *See id.* at 13.
[284] *Id*.
[285] Mem. from Steven A. Herman & Robert Perciasepe, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999).
[286] *Id*.

approve state implementation plans that contained affirmative defenses to civil penalties in cases where an SSM event had prevented the proper operation of control technologies.[287]

Texas subsequently submitted state implementation plan revisions that created affirmative defenses to administrative penalties for both planned and unplanned SSM events.[288] The EPA approved the revisions creating an affirmative defense for unplanned events but disapproved the revisions creating one for planned events.[289] A coalition of environmental activists sued the EPA over its approval, arguing that affirmative defenses for unplanned events deprived the federal courts of their authority under the Clean Air Act.[290] At the same time, an industrial coalition sued the EPA over its disapproval, arguing that the EPA lacked authority under the Clean Air Act to disapprove affirmative defenses for planned events.[291] The Fifth Circuit rejected both challenges in 2013.[292]

On June 12, 2015, the EPA changed course in response to a petition from the Sierra Club.[293] Reversing over forty years of continuous practice, it found that the Clean Air Act disallowed the use of any affirmative defenses to excess emissions from SSM events because such defenses unlawfully deprived the federal courts of authority granted by the Act.[294] Accordingly, it issued a call to all states with state implementation plans that included affirmative defenses for SSM events, including Texas, to submit revisions removing those defenses by November 22, 2016.[295] In place of the defenses it is disallowing, the EPA recommends that states use enforcement discretion to decline to prosecute cases of blameless excess emissions.[296] The EPA suggests that environmental activist groups should also be accommodating and refrain from bringing citizen suits when excess emissions are beyond an emission source's control.[297]

Texas has challenged the EPA's change of course in the D.C. Circuit along with eighteen other states and a coalition of industrial interests.[298] Briefing is ongoing as of the date of this Report, and oral argument has not been scheduled yet.[299] In the meantime, the TCEQ has submitted revisions to its state implementation plan that leave the affirmative defenses in place

[287] Mem. from Steven A. Herman & Robert Perciasepe, *State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown* (Sept. 20, 1999).
[288] *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 849 (5th Cir.), *cert. denied*, 134 S. Ct. 387 (2013).
[289] *Id*.
[290] *Id.* at 851–55
[291] *Id.* at 855–59.
[292] *Id*. at 860.
[293] 80 Fed. Reg. 33,840 (June 12, 2015).
[294] *Id.* at 33,840, 33,843, 33,851–53.
[295] *Id*.
[296] *Id*.
[297] *Id.* at 33,852.
[298] Written Testimony of Caroline Sweeney, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).
[299] *Id*.

but clarify that they do not limit the authority of the federal courts.[300] If the EPA rejects these revisions as insufficient, it can issue a federal implementation plan.[301] The revisions would not be effective unless Texas loses its suit in the D.C. Circuit.[302]

While the EPA's call for revisions to the State's implementation plan has no direct costs, it will likely result in an increase in the penalties assessed against industries for SSM events that are beyond their control. That the State may use its discretion to decline to seek penalties in these cases is of slight relevance. Under the demanded revisions, the citizen suit provisions of the Clean Air Act would empower environmental activists to seek penalties regardless of blameworthiness or the State's desire to prosecute. This could ultimately create an unbalanced regulatory climate that wastes resources by achieving the same level of compliance at a much higher cost to industry, resulting in higher costs to consumers and lower competitiveness on the global market.

J. Waters of the United States

The purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[303] With that objective in mind, the statute generally prohibits "the discharge of any pollutant by any person" except as authorized by the Act.[304] The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to *navigable waters* from any point source."[305] It defines "pollutant" as "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[306] The Act authorizes the Secretary of the Army, acting through the Chief of Engineers of the Army Corps of Engineers (Corps), to issue permits for "discharge of dredged or fill material into the navigable waters at specified disposal sites."[307] Discharges of other pollutants not administered by the Corps into navigable waters require a permit from the EPA, which has delegated some of its permitting authority to the states.[308] Failure to obtain a permit required by the Act can result in civil and criminal liability.[309]

---

[300] Whit Swift, "Texas Commission on Environmental Quality Adopts Changes to Affirmative Defense Rule in Response to EPA SIP Call", NATIONAL LAW REVIEW (Nov. 3, 2016).
[301] Written Testimony of Caroline Sweeney, Senate Committee on Natural Resources and Economic Development 1 (Sept. 28, 2016).
[302] *Id*.
[303] 33 U.S.C. § 1251(a) (2016).
[304] *Id.* at § 1311(a).
[305] *Id.* at § 1362(12) (emphasis added).
[306] *Id.* at § 1362(6).
[307] *Id.* at § 1344.
[308] *Id.* at §§ 1311(a), 1342(a), 1344(c). *See Rapanos v. United States*, 547 U.S. 715, 760 (2006) (Kennedy, J., concurring).
[309] 33 U.S.C. § 1319 (2016).

By its own terms, the Act concerns only discharges into "navigable waters."[310] However, it defines "navigable waters" more broadly than the traditional meaning of the term,[311] stating that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."[312] The Corps and the EPA took a progressively broader view of what the "waters of the United States," were, defining them in 1986 as "traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands."[313] Justice Scalia summarized the sweeping impact of this definition as follows:

> In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."[314]

Resistance to this broad interpretation eventually brought the meaning of "waters of the United States" before the Supreme Court in the 2006 case of *Rapanos v. United States*.[315]

In *Rapanos*, the Supreme Court split 4-1-4 over the definition of "waters of the United States." Scalia authored the plurality opinion joined by Chief Justice Roberts and Justices Alito and Thomas, arguing that it meant "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. The phrase does not include channels through which water

---

[310] *Id.* at §§ 1311(a), 1362(12). *Rapanos*, 547 U.S. at 760.
[311] "For a century prior to the C[lean]W[ater]A[ct], we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality op.).
[312] 33 U.S.C. § 1362(7) (2016).
[313] 80 Fed. Reg. 37,056 (June 29, 2015).
[314] *Rapanos*, 547 U.S. at 722 (plurality op.).
[315] *Id.* at 715.

flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[316]

Justice Kennedy filed an opinion concurring with the result that the plurality reached, but not its reasoning, arguing that, "to constitute '"navigable waters"' under the Act, a water or wetland must possess a '*significant nexus*' to waters that are or were navigable in fact or that could reasonably be so made."[317] He argued that the mere presence of a constantly-flowing surface water connection was not enough to establish a significant nexus, because "the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[318] Instead, he wrote that the nexus issue should be analyzed in light of the statute's goal of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters," meaning that waters possessed the "requisite nexus" where they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[319] Along these same lines, he noted that one of the reasons he disagreed with Scalia's plurality definition was that, "by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."[320]

Justice Stevens authored an opinion for the four dissenters, who believed the agencies' interpretation had not exceeded the authority granted to them by the Congress and would have upheld it.[321] In closing, Stevens noted that, despite the failure of the Court to agree on a single definition, future agency action defining "waters of the United States" based on either Scalia's or Kennedy's definition had the support of at least five members of the Court, because the dissenters' broader view of the term's meaning included all of the water encompassed by Scalia's and Kennedy's competing, narrower definitions.[322]

In June 2015, the EPA and the Corps jointly published a new definition of "waters of the United States" in the Federal Register, updating their respective regulations to match it.[323] Their stated goal was to provide more clarity and predictability to Clean Water Act permitting by creating a definition that reduced the number of case-by-case determinations that had to be made during the permitting process while also satisfying the Supreme Court's opinion in *Rapanos* by narrowing the 1986 definition the Court had disapproved.[324] Although the agencies purported to

[316] *Rapanos*, 547 U.S. at 739 (plurality op.) (internal citations and quotation marks removed).
[317] *Id.* at 759 (Kennedy, J., concurring) (emphasis added).
[318] *Id.* at 784–85.
[319] *Id.* at 779–80.
[320] *Id.* at 776–77.
[321] *Id.* at 809–10.
[322] *Id.* at 810.
[323] 80 Fed. Reg. 37,054 (June 29, 2015).
[324] *Id*.

derive their new definition from Kennedy's opinion in *Rapanos*,[325] they ultimately concluded that nearly all water is interconnected in significant physical, chemical, or biological ways, meaning almost every water feature has a significant nexus to a navigable body of water.[326] Accordingly, their resulting definition includes the sorts of remote wetlands and small, but continuously-flowing streams that had caused Kennedy to find Scalia's definition problematic, as well as obscure features that likely fail to satisfy either justice's opinion.[327]

The final rule states that some waters are automatically considered "waters of the United States" without any further analysis required by the agencies, while others require a case-by-case determination of whether a significant nexus is present.[328] The following waters are automatically "waters of the United States" under the new definition:

> (1) all waters susceptible of use in interstate or foreign commerce,
>
> (2) all interstate waters and wetlands,
>
> (3) the territorial seas,
>
> (4) impoundments of any waters of the United States,
>
> (5) all tributaries of waters described in (1)–(3), and
>
> (6) all waters adjacent to (1)–(5).[329]

"Adjacent" is defined as including all waters that connect segments of water described in (1)–(5) and all waters neighboring (1)–(5), with "neighboring" defined as being either within 100 feet of a high water mark, or within 1,500 feet of the high water mark and also inside the 100-year floodplain, or within 1,500 feet of the high tide line of waters described in (1)–(5) or the high water mark of the Great Lakes.[330] "Tributaries" is defined as "water that contributes flow, either directly or through another water . . . to a water identified in paragraphs [(1)] through [3] . . . that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark."[331] The rule also cautions that "[a] tributary can be a natural, man-altered, or man-made and includes waters such as rivers, streams, canals, and ditches . . . ."[332]

---

[325] 80 Fed. Reg. 37,056 (June 29, 2015).
[326] *See id.* at 37062–73.
[327] *See* State Petitioners' Motion for Stay Pending Review, *State of Ohio, et al. v. U.S. Army Corps. of Engineers, et al.*, No. 15-3799, at 12–14 (D.C. Cir. Sept. 9, 2015).
[328] *See* 80 Fed. Reg. 37,104–05 (June 29, 2015).
[329] *Id.* at 37,104.
[330] *Id.* at 37,105.
[331] *Id*.
[332] *Id.* at 37,105–06.

The following waters require a case-by-case determination by the agencies, and are only considered "waters of the United States" if they have a significant nexus to waters described in (1)–(3):

(7) all of the following waters that share the same drainage basin:

(i) prairie potholes,

(ii) Carolina bays and Delmarva bays,

(iii) Pocosins,

(iv) Western vernal pools, and

(v) Texas coastal prairie wetlands; and

(8) all waters located within the 100-year floodplain of a water described in (1)–(3), as well as all waters located within 4,000 feet of the high tide line or the high water mark of a water described in (1)–(5).[333]

"Significant nexus" is defined as meaning "that a water, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs [(1)] through [(3)] . . . ."[334] Of the features described in (7), the last is the only type found in Texas, and is identified as "freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast."[335]

After listing the waters that meet its definition of "waters of the United States," the agencies' definition proceeds to exclude the following waters:

(1) waste treatment systems;

(2) prior converted cropland;

(3) ditches with: (i) ephemeral flow that are not relocated or excavated tributaries, (ii) intermittent flows that are not relocated tributaries, excavated tributaries, or draining wetlands, and (iii) ditches that do not flow into waters susceptible of use in interstate or foreign commerce, interstate waters or wetlands, or territorial seas;

(4) (i) artificially irrigated areas, (ii) artificial lakes and ponds built on dry land, (iii) artificial reflecting and swimming pools, (iv) small ornamental waters

[333] 80 Fed. Reg. 37,104–05 (June 29, 2015).
[334] *Id.* at 37,105.
[335] *Id.*

built on dry land, (v) mining pits, (vi) erosion features like gullies, and (vii) puddles;

(5) groundwater;

(6) stormwater control features built on dry land; and

(7) wastewater recycling structures built on dry land.

While these exemptions were designed to set landowners at ease, particularly those involved in agriculture,[336] that goal is undermined by the requirement that the improvements listed in (4)(ii), (4)(iv), (6), and (7) be built on "dry land." It is difficult for anyone to find comfort in a safe harbor provision for "dry land" in a rule that considers so little land to be dry that its drafters believed puddles needed to be excluded by name.[337]

Although the Corps and the EPA stated that one of their goals was to constrain the unlawful breadth of their 1986 definition,[338] they admit they expect their new definition to increase the number water features they determine to be "waters of the United States" by between 2.84 and 4.65 percent annually.[339] This increase will result in significant delays and expenses to landowners who apply for permits. In his *Rapanos* opinion, Scalia reported that "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."[340] Witnesses representing agriculture, ranching, and building interests testified that they greatly fear the uncertainty and expense the new definition will bring to their industries.[341]

The State of Texas challenged the agencies' definition in federal court shortly after its promulgation, and the challenge was eventually consolidated with those of seventeen other states and various private interests in the United States Court of Appeals for the Sixth Circuit (Sixth Circuit).[342] The Sixth Circuit implemented a nationwide stay on October 9, 2015, after finding that the challengers had demonstrated a substantial likelihood that they would succeed in

[336] *See* 80 Fed. Reg. 37,055 (June 29, 2015).
[337] *Cf.* Testimonies of Ned Muñoz, Jay Bragg, & Joe Leathers, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[338] 80 Fed. Reg. 37,054 (June 29, 2015).
[339] *Id.* at 37,101.
[340] *Rapanos*, 547 U.S. at 721.
[341] Testimonies of Ned Muñoz, Jay Bragg, & Joe Leathers, Senate Committee on Natural Resources and Economic Development (Sept. 28, 2016).
[342] Written Testimony of L'Oreal Stepney, Senate Committee on Natural Resources and Economic Development 2 (Sept. 28, 2016).

convincing the court to strike the new definition down.[343] The rule remains stayed as of the date of this Report, but the court has not reached a final decision on the merits.

II. Discussion

The Committee heard testimony and discussed the Lieutenant Governor's charge on September 28, 2016.

In general, the regulations examined by the Committee follow a disturbing pattern of imposing great costs for comparatively small or artificially-inflated benefits. Cleaner air and cleaner water are laudable goals that are in both the State's and the federal government's interests. But the State and the nation also have an interest in access to affordable electricity, gasoline, plastics, and the thousand other products that make life in the 21st Century cleaner, healthier, and more comfortable than it was in the 18th, even when these come at an undeniable cost to the environment. The regulations examined by the Committee tend to severely discount productive interests in favor of minor environmental ones, and the result will be a significantly higher cost of living, which can have well-documented health detriments[344] of its own that undercut the benefits proffered by the regulations' proponents.

The Committee is particularly concerned about the continued availability of inexpensive, reliable electricity. A significant portion of Texas's power is generated by its coal plants, especially in East Texas and especially during the summer. The Clean Power Plan, Regional Haze, CSAPR, MATS, and the sulfur dioxide standards threaten to work in concert like a slipknot around the industry's neck, jeopardizing not only electric reliability, but also the prices that make Texas an attractive place to locate manufacturing and air-conditioned homes. While it is true that the coal generation industry faces significant market challenges due to its fuel costs, the Committee does not doubt that regulatory policies mandating expensive technological upgrades play a significant supporting role in its increasing marginalization. Hundred-million-dollar pieces of pollution control equipment have to be paid off eventually, and that results in higher prices that must be charged on top of fuel cost recovery and normal overhead, leading to reduced sales in markets like ERCOT that buy the lowest-cost generation first.

The Committee is also especially concerned about the potential cost of the lowered ozone standards, given the general agreement that they could be the single most expensive environmental regulation the State has ever faced. A silver lining on this storm cloud is that the State already has a program in place to help address this issue proactively, without resorting to as many of the coercive controls and mandatory lifestyle changes that states sometimes have to implement in ozone non-attainment areas. All of the witnesses that testified before the Committee on the revised ozone standards agreed that the Texas Emissions Reduction Program

[343] Order of Stay, *State of Ohio, et al. v. U.S. Army Corps of Engineers, et al.*, No. 15-3799, at 4 (6th Cir. Oct. 9, 2015) (slip op.).
[344] *See* http://www.princeton.edu/rpds/papers/Deaton_Health_Inequality_and_Economic_Development_JEL.pdf pg. 116

(TERP), which is designed to reduce nitrogen oxides emissions from mobile sources, is the most cost-effective tool available to the State to try to achieve compliance. TERP is fully addressed below as part of this Report's discussion of Interim Charge No. 2.

The Supremacy Clause of the U.S. Constitution limits the ability of the State to fight federal regulations it finds to be unjustified, either through statutory or constitutional measures. This makes litigation in the federal courts the State's only viable avenue of resistance. The State's attorneys have successfully thwarted, delayed, and defeated many of the damaging regulations the Committee reviewed in the courts and continue to fight them effectively as of the date of this Report. Their efforts have been aided by the EPA's tendency to grossly exceed its delegated authority and ignore proper administrative procedure, but they have also litigated with talent and persistence that warrants commendation.

III. Recommendations

The Committee finds that federal litigation is the only effective means of resisting federal regulations that harm the interests of the State and that the Office of the Attorney General of Texas has successfully delayed or defeated many harmful actions by the EPA over the last eight years. The Committee further finds that, when challenged federal regulations cannot be defeated in the courts, the State should attempt to comply with them using the means that will be the least disruptive and most cost-effective to its citizens. With this in mind, the Committee recommends that the 85th Legislature:

1. Fully fund and support the Attorney General's Office in its ongoing battles against overreach by the EPA and other federal agencies;

2. Extend TERP as the least disruptive means of complying with the recently-lowered national ambient air quality standards for tropospheric ozone, as discussed in more detail below in response to Charge 2; and

3. Implement the least disruptive means of complying with challenged federal regulations the State is unable to defeat in court.

Charge No. 2

Texas Emission Reduction Plan (TERP): *Study and make recommendations regarding the use of Texas Emission Reduction Plan (TERP) funds, including reducing air emissions from mobile sources in response to changes in ozone standards.*

I. Background

The Texas Emissions Reduction Plan is a critical component of Texas's state implementation plan for attaining the Environmental Protection Agency's (EPA) national ambient air quality standards for ground-level ozone.

A. History of the Clean Air Act and Ground-Level Ozone Standards

In 1970, Congress enacted federal Clean Air Act amendments that required the Environmental Protection Agency to create and periodically revise a list of air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare . . . the presence of which in the ambient air results from numerous or diverse mobile or stationary sources . . . ."[345] The Act requires the EPA to issue "air quality criteria" for each listed pollutant that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities."[346] The Act further instructs the EPA to publish regulations prescribing national ambient air quality standards and periodically revise them to protect the public health and welfare.[347]

Once the EPA sets national ambient air quality standards, the Clean Air Act requires each state to submit an implementation plan to the EPA describing how the state plans to attain the standards.[348] If a state fails to submit an adequate plan, the Act requires EPA to promulgate a federal implementation plan.[349] If a state submits an adequate plan but fails to enforce it, the Act empowers the EPA to enforce it.[350] State implementation plans usually approach attainment at the county level, and the counties that fall short of national ambient air quality standards are commonly called "non-attainment" counties.

The EPA listed ground-level ozone as a criteria pollutant on April 30, 1971.[351] At that time, it set the primary national ambient air quality standard for ozone at an average of 80 parts-

[345] 42 U.S.C. § 7408(a) (2016).
[346] *Id*.
[347] *Id.* at § 7409.
[348] *Id.* at § 7410(a).
[349] *Id.* at § 7410(c).
[350] *Id.* at § 7413(a)(2).
[351] 36 Fed. Reg. 8186 (Apr. 30, 1971). The Clean Air Act and the EPA regulate stratospheric ozone separately. *See generally* 42 U.S.C. §§ 7671–7671q (2016).

per-billion (ppb) over a one-hour time period, but this was relaxed to 120 ppb in 1979.[352] The one-hour 120 ppb standard remained constant until 1997, when the EPA tightened it to 80 ppb averaged over an eight-hour time period.[353]

Ground-level ozone, the primary component of smog, is the product of chemical reactions that occur in the presence of sunlight between nitrogen oxides (NO_x) and volatile organic compounds.[354] Nitrogen oxides are byproducts of combustion, and the two largest sources of nitrogen oxides in the United States are vehicles and power plants.[355]

B. Origins of TERP

Texas had difficulty complying with the eight-hour, 80 ppb standard the EPA promulgated in 1997 over the prior one-hour 120 ppb standard. In order to achieve the reductions necessary to meet the new standard, the state implementation plan that Texas submitted prohibited the use of construction or industrial diesel equipment from 6:00 to 10:00 a.m. in the Dallas–Fort Worth area and from 6:00 a.m. to 12:00 p.m. in the Houston–Galveston area.[356] The plan further required the owners or operators of all diesel-powered construction, industrial, commercial, and lawn and garden equipment rated at 50 horsepower or higher to upgrade to lower-emission equipment by the end of 2007.[357]

The Legislature enacted S.B. 5 in 2001 to replace the mandatory, coercive emissions reduction measures in the state implementation plan with TERP, a voluntary, incentive-based program administered by the Texas Natural Resource Conservation Commission, the predecessor agency to the Texas Commission on Environmental Quality (TCEQ).[358] As originally enacted, TERP included a diesel emissions reduction incentive program, a motor vehicle purchase or lease incentive program, a new technology research and development program, and an energy efficiency grant program.[359] TERP's incentive programs provided grants to individuals and entities who applied to replace high-emissions vehicles and equipment with low-emissions alternatives in non-attainment and near-non-attainment counties.[360] Its research and development program provided grants to applicants to investigate and verify emissions-reducing technologies.[361] TERP was originally scheduled to expire on August 31, 2008,[362] by which point

---

[352] Environmental Protection Agency, *Table of Historical Ozone National Ambient Air Quality Standards (NAAQS)*, Available at: https://www.epa.gov/ozone-pollution/table-historical-ozone-national-ambient-air-quality-standards-naaqs (Sept. 18, 2016).
[353] *Id*.
[354] Clean Air Technology Center, *Nitrogen Oxides (NOx), Why and How They Are Controlled* 1 (Nov. 1999).
[355] *Id.* at 4.
[356] House Research Organization, *Paying for Clean Air: New Funding Options* 2 (Feb. 18, 2003).
[357] *Id*.
[358] *See* S.B. 5, 77th Leg., Reg. Sess. (Tex. 2001) (Section 18 of the bill specifically instructed the precursor agency of the TCEQ to revise the state implementation plan to replace the mandatory measures with TERP).
[359] *See id*.
[360] *See id*.
[361] *See id*.
[362] *Id*.

the Legislature presumed Texas would have attained the eight-hour, 80 ppb standard, making the program unnecessary.[363]

Between 2001 and the present, the EPA lowered the eight-hour ground-level ozone standard twice more, to 75 ppb in 2008 and then to 70 ppb in 2015.[364] As a result, TERP continued to be needed, and the Legislature did not allow it to expire in 2008. Instead, the Legislature added many additional programs to TERP designed to use its funding to further reduce nitrogen oxides emissions. Today, TERP is comprised of eight incentive grant programs, as well as three energy efficiency programs and three research programs:[365]

Incentive Grant Programs

1. Diesel Emissions Reduction Incentive (DERI) Program
2. Texas Clean Fleet Program (TCFP)
3. Texas Natural Gas Vehicle Grant Program (TNGVGP)
4. Drayage Truck Incentive Program (DTIP)
5. Clean Transportation Triangle (CTT) Grant Program
6. Alternative Fueling Facilities Program (AFFP)
7. Texas Clean School Bus (TCSB) Program
8. New Technology Implementation Grants (NTIG) Program

Energy Efficiency Programs

1. Goal for Energy Efficiency
2. Energy Efficiency Programs in Institutions of Higher Education and Certain Government Entities
3. Texas Building Energy Performance Standards

Research Programs

1. Regional Air Monitoring Program
2. Health Effects Study
3. Air Quality Research Support Program

A detailed description of these programs is beyond the scope of this Report but can be found in the TCEQ's biennial report on TERP.[366]

[363] This was not an unreasonable assumption, given that the previous standard had been left in place for almost twenty years.
[364] Environmental Protection Agency, *Table of Historical Ozone National Ambient Air Quality Standards (NAAQS)*, Available at: https://www.epa.gov/ozone-pollution/table-historical-ozone-national-ambient-air-quality-standards-naaqs (Sept. 18, 2016).
[365] Texas Commission on Environmental Quality, *Texas Emissions Reduction Plan Biennial Report (2013-2014), A Report to the 84th Texas Legislature* 1–2 (December 2014); Legislative Budget Board, *Sources and Uses of the Clean Air Account and Texas Emissions Reduction Plan Account* 17 (Sept. 2015).
[366] *See id*.

C. History of TERP Funding

When the Legislature enacted the TERP program in 2001, it created several different fees and surcharges to fund the program that paid into a general revenue–dedicated account known as the TERP Fund.[367] The Legislature expected the bulk of the TERP Fund's revenues to be generated by a $225 inspection fee that S.B. 5 imposed on registering out-of-state vehicles.[368] However, the courts struck down this fee in 2002 because it violated both the Commerce Clause and the Equal Protection guarantee of the U.S. Constitution, as well as Article I, Section 3 of the Texas Constitution.[369] The TERP Fund subsequently missed its revenue estimates by 85 percent, causing TERP to fall short of its emissions reduction targets.[370] This prompted the EPA to issue proposed findings in August 2002 that Texas had failed to follow its state implementation plan and that Texas's revised implementation plan was inadequate.[371] The EPA delayed finalizing both findings until September 2003 to give the 78th Legislature a chance to convene and remedy TERP's lack of funding.

In response to the EPA's threats, the 78th Legislature enacted H.B. 1365. Prior to 2003, the certificate of title fee paid by the owner of a motor vehicle to obtain a title was $13, of which $5 was paid to the treasurer of the county in which the vehicle was registered, and $8 was paid to the Texas Department of Transportation (TxDOT).[372] After H.B. 1365's enactment, the certificate of title fee became $33 in counties that had been designated non-attainment and $28 in all other counties.[373] The county treasurer continued to receive $5 of this money, and TxDOT continued to receive $8, but the remaining $15–20 were sent to the Comptroller of Public Accounts.[374] The bill instructed the Comptroller to deposit this money in the TERP Fund until September 1, 2008,[375] when TERP was scheduled to expire. After that, the certificate of title fee in non-attainment counties would decrease to $28, and the Comptroller was to begin depositing $15 from each fee in the Texas Mobility Fund instead of the TERP fund.[376]

By 2005, the Legislature no longer believed that TERP would outlive its usefulness by 2008. Accordingly, H.B. 2481 provided for the extension of TERP and its funding mechanisms

---

[367] S.B. 5, 77th Leg., Reg. Sess. (Tex. 2001).
[368] House Research Organization, *Paying for Clean Air: New Funding Options* 5 (Feb. 18, 2003).
[369] *H.M. Dodd Motor Co. Inc. v. Texas Dep't of Public Safety*, No. GN102585 (200th Dist. Ct., Travis County, June 6, 2002).
[370] House Research Organization, *Paying for Clean Air: New Funding Options* 5–6 (Feb. 18, 2003).
[371] *Id*.
[372] *See* H.B. 1365, 78th Leg., Reg. Sess. (Tex. 2003).
[373] *Id*.
[374] *Id*.
[375] *Id*.
[376] *Id*. The Texas Mobility Fund is a revolving fund in the State treasury administered by the Texas Transportation Commission (TTC) and TxDOT for the design, construction, reconstruction, acquisition, and expansion of state highways. Legislative Budget Board, *Texas Highway Funding* 2 (April 2016). At the time of its creation, it was a deviation from the pay-as-you-go system that had previously characterized Texas's transportation funding in that it authorized the TTC to borrow money to fund its projects. *Id.* at 24.

to 2010.[377] However, the Texas Constitution prohibited the Legislature from making corresponding amendments to the statute instructing the Comptroller to begin transferring certificate of title fee revenue to the Texas Mobility Fund after 2008.[378] Under the Texas Constitution, the Legislature could only take revenue away from the Texas Mobility Fund if it replaced it with a greater or equal amount.[379] Therefore, instead of designating an alternative source of revenue, the Legislature instructed the Comptroller to keep a record of the amount transferred to the Texas Mobility Fund each month and to then transfer an equal amount of money out of the State Highway Fund and into the TERP Fund.[380] This maneuver extended TERP's funding from the same sources until its planned expiration in 2010 while satisfying the letter of the Constitution's protection of the Texas Mobility Fund's revenue stream. The bill also provided that $5 of the fees collected in non-attainment counties between 2008 and 2010 would be sent directly to TERP by the Comptroller.[381] This transfer did not create a constitutional issue because it involved new money that had not previously been committed to the Texas Mobility Fund: prior to H.B. 2481's enactment, non-attainment counties were to cease paying $5 more than other counties on September 1, 2008.[382]

In 2007, the 80th Legislature extended TERP to 2013 and its funding mechanisms until 2015.[383] In 2009, the 81st Legislature extended TERP and its funding mechanisms until 2019, but did not alter the statutory instruction that the extra $5 paid by applicants in non-attainment counties be transferred to the TERP fund only through September 2015.[384] Subsequent Legislatures did not alter this provision, either,[385] and the Comptroller began transferring the extra $5 paid by applicants for certificates of title in non-attainment counties to the Texas Mobility Fund on September 1, 2015.[386]

As of the date of this Report, TERP has five different revenue streams, all of which are derived from sources of the nitrogen oxides emissions that TERP is designed to reduce.[387] These funding sources, along with the amount of revenue expected to be produced by each during the present biennium, are shown below:

---

[377] H.B. 2481, 79th Leg., Reg. Sess. (Tex. 2005).
[378] Tex. Const. Art. III, Sec. 49–k(f).
[379] *Id*.
[380] H.B. 2481, 79th Leg., Reg. Sess. (Tex. 2005).
[381] *Id*.
[382] *See id*.
[383] S.B. 12, 80th Leg., Reg. Sess. (Tex. 2007).
[384] H.B. 1796, 81st Leg., Reg. Sess. (Tex. 2009).
[385] *See* Tex. Trans. Code § 501.138(b–1) (2016).
[386] *See* Comptroller of Public Accounts, *Biennial Revenue Estimate: 2016–2017 Biennium* 60 (January 2015). The net effect is the same, however, as the additional $5 contributed to the Texas Mobility Fund merely increases the amount transferred into the TERP Fund from the State Highway Fund.
[387] *See* Texas Commission on Environmental Quality, *Texas Emissions Reduction Plan Biennial Report (2013-2014), A Report to the 84th Texas Legislature* 2–3 (December 2014). TERP also receives roughly $5 million each year in judgments and settlements. Comptroller of Public Accounts, *Biennial Revenue Estimate: 2016–2017 Biennium* 61 (January 2015).

Figure 1: TERP Funding Sources[388]

Statute	Description	Revenue in 2016–17 Biennium
Tax Code § 151.0515(b)	2% surcharge on the sale price or lease or rental amount of off-road diesel equipment sold, rented, or leased	$102,300,000
Tax Code § 152.0215(a)	2.5% surcharge on the total consideration on the sale or lease of pre–1997 on-road diesel vehicles over 14,000 pounds, and a 1% surcharge for vehicles made after 1997	$31,100,000
Trans. Code § 502.358	10% surcharge on the total fees due for the registration of truck-tractors and commercial motor vehicles	$28,500,000
Trans. Code § 501.138	Amount transferred out of the State Highway Fund equal to $20 out of the certificate of title fees for applicants in the non-attainment and near-non-attainment counties $15 out of the fees for applicants in all other counties	$240,800,000
Trans. Code § 548.5055	$10 fee on commercial motor vehicles required to have an annual safety inspection	$13,900,000

Combined, these sources are expected to produce $416.6 million over the course of the present biennium.[389]

D. TERP Fund Balance

Of the $416.6 million in expected revenue over the course of the present biennium, the 84th Legislature appropriated only $237.2 million.[390] This was not a new phenomenon. Between December 2006 and August 2016, the TERP Fund balance grew from $67 million[391] to $1.27 billion.[392] The growth in the TERP Fund balance is encouraged by two related, but distinct budgeting issues: the constitutional spending limit and the use of General Revenue–Dedicated accounts like the TERP Fund to certify the budget.

i. Constitutional Spending Limit

Article VIII, Section 22 of the Texas Constitution limits the growth in appropriations from one biennium to the next by providing that "[i]n no biennium shall the rate of growth of appropriations from state tax revenues not dedicated by this constitution exceed the estimated rate of growth of the state's economy." This is commonly known as the "constitutional spending limit." It impacts TERP because the surcharges on the sales, leases, and rental prices of on- and

[388] Texas Commission on Environmental Quality, *Texas Emissions Reduction Plan Biennial Report (2013-2014), A Report to the 84th Texas Legislature* 2–3 (December 2014); Legislative Budget Board, *Sources and Uses of the Clean Air Account and Texas Emissions Reduction Plan Account* 14 (Sept. 2015).
[389] Legislative Budget Board, *Sources and Uses of the Clean Air Account and Texas Emissions Reduction Plan Account* 14 (Sept. 2015).
[390] *Id.* at 15.
[391] Senate Committee on Natural Resources, *Interim Report to the 80th Legislature: State Air Programs* 3 (Dec. 2006).
[392] Comptroller of Public Accounts, Personal Communication, Sept. 20, 2016.

off-road diesel vehicles are considered taxes under Texas law. The portion of the TERP Fund attributable to this tax revenue is therefore subject to the constitutional spending limit, while the remainder is not.[393]

The Legislative Budget Board (LBB) allocates the money appropriated to TERP between tax revenues, which are subject to the limit, and fees, which are not, according to the proportion of the total TERP Fund revenues attributable to each source during that biennium.[394] For example, if the TERP Fund were projected to receive $150 million in revenue over the course of a hypothetical biennium, $50 million of which were from taxes and $100 million of which were from fees, and the Legislature appropriated $120 million to TERP programs, the LBB would count one-third of the $120 million, or $40 million, as appropriations from state tax revenues for the purpose of determining whether the constitutional spending limit had been exceeded. The remaining $80 million would not factor into the determination. The LBB applies the same methodology to balances left unspent in the TERP Fund.[395] For example, to continue the foregoing hypothetical, if the $30 million balance remaining in the TERP Fund were subsequently appropriated in a later biennium, $10 million would be characterized as taxes and counted against the spending limit, while $20 million would be characterized as fees. Under the LBB's system of allocation, the TERP Fund balance currently contains $402.5 million attributable to state tax revenues, and approximately $800 million attributable to fees that do not count towards the limit.[396]

The constitutional spending limit primarily impacts TERP appropriations in years where a strong economy produces surpluses that the Legislature wishes to spend. In these years, additional TERP spending would push the overall budget closer to violating the constitutional spending limit. Under these circumstances, previous legislatures have favored other spending over reducing the TERP account balance.

ii. Certification of the Budget

Article III, Section 49a of the Texas Constitution requires that all appropriations be within available revenue in the fund from which the appropriations are made. In 1991, the 72nd Legislature passed S.B. 3,[397] which was intended to abolish dedicated funds by 1995 as part of a two-step process. The first step, which took effect in 1993, was to consolidate all dedicated funds into General Revenue as General Revenue–Dedicated accounts.[398] The second step was to have been abolishing General Revenue–Dedicated accounts in 1995, but subsequent legislatures

[393] Testimony of Stewart Shallow, Senate Committee on Natural Resources and Economic Development, September 28, 2016.
[394] *Id*.
[395] *Id*.
[396] *Id*.
[397] S.B. 3, 72nd Leg., 1st C.S. (Tex. 2005).
[398] Legislative Budget Board, *Further Reduce Reliance on General Revenue–Dedicated Accounts for Certification of the State Budget* 2 (Feb. 2015).

exempted most of the General Revenue–Dedicated accounts from abolition, and full consolidation never occurred.[399] In order to ease the consolidation process, S.B. 3 had provided that unappropriated revenues in General Revenue–Dedicated accounts were available for general governmental purposes and could be used by the Comptroller to certify that the budget satisfied the requirements of Article III, Section 49a.[400] This provision was not removed from the law after subsequent legislatures decided against abolishing General Revenue–Dedicated accounts.[401] It subsequently took on a life of its own:

> Since the initial elimination of accounts in 1995, General Revenue–Dedicated balances typically have not been transferred into the General Revenue Fund and have not been approved for general purposes. The balances, however, have been counted as available for certification of General Revenue Fund appropriations. The practice of counting unappropriated General Revenue–Dedicated balances as available for certification allows the Legislature to appropriate smaller amounts from these dedicated accounts for their statutory purpose, leaving fund balances to facilitate compliance with the "Pay-As-You-Go-Limit" and to help fund budget priorities. This practice has led to accumulations of large balances in multiple accounts.[402]

The State's reliance on these large balances to certify its budget has increased significantly in recent years.[403]

The use of the TERP Fund to certify the budget primarily impacts TERP appropriations in sessions when a weak economy depresses state revenues, requiring the Legislature to cut services and funding in order to balance its budget. In such sessions, leaving a large unappropriated balance in the TERP Fund gives the Legislature the ability to balance the budget on paper, while simultaneously spending more on programs unrelated to TERP than the state's expected revenues can actually support.

II. Discussion

The Committee heard testimony and discussed the Lieutenant Governor's charge on November 6, 2015. Although the witnesses who testified before the Committee represented a wide variety of viewpoints that often conflict on other issues, all unanimously agreed that TERP was an effective program that ought to be extended beyond 2019 to help the State comply with the EPA's recently-lowered ozone standards.

---

[399] Legislative Budget Board, *Further Reduce Reliance on General Revenue–Dedicated Accounts for Certification of the State Budget* 2 (Feb. 2015).
[400] *Id*.
[401] *Id*.
[402] *Id*.
[403] *Id*.

A. Effectiveness

TERP is effective because it targets the sources that provide the majority of the nitrogen oxides emissions in Texas's non-attainment areas. As of 2015, mobile source emissions accounted for 67% of all nitrogen oxides emissions in the Houston–Galveston–Brazoria area, 78% in the Dallas–Fort Worth area, 60% in the San Antonio area, and 72% in the El Paso Area.[404] While point sources formerly produced a much larger share of the State's nitrogen oxides emissions, aggressive attempts to comply with ozone standards over the last twenty-five years have reduced nitrogen oxides emissions from point sources by 86% in Houston–Galveston–Brazoria and 64% in Dallas–Fort Worth. As pollution from point sources has been reduced, achieving additional reductions from point sources has grown progressively more expensive.[405] In the year preceding this Report, reductions in the Houston–Galveston–Brazoria market traded[406] for an average of $87,500 per ton of nitrogen oxides reduced from a point source and $198,565 per ton of volatile organic compounds reduced.[407] Point sources in the Dallas–Fort Worth area have not yet reached the diminishing returns of the Houston area: each ton of volatile organic compounds traded for an average of $4,404 there, and no external trades were made in the market for nitrogen oxides.[408] TERP also experiences diminishing returns from each new dollar spent reducing emissions from mobile sources, but the differences in cost compared to point-source reductions in the Houston area are significant. The cost of reducing a ton of nitrogen oxides across all TERP programs in the present biennium averages approximately $12,580 as of the date of this Report.[409]

However, the programs within TERP are not equally efficient. Historically, from the enactment of the program to present, TERP's programs have performed as follows:

[404] Texas Commission on Environmental Quality, Personal Communication (Sept. 30, 2016).
[405] *See* Testimony of Hector Rivero, Senate Committee on Natural Resources and Economic Development, November 6, 2015.
[406] Businesses wishing to add emissions to non-attainment areas must first reduce more emissions than they plan to add. Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development, September 28, 2016. This results in a local market upon which reductions can be traded, and a market price per ton in that region.
[407] Texas Commission on Environmental Quality, Personal Communication, Oct. 4, 2016. This figure does not include the cost of reductions made by companies internally.
[408] *Id*.
[409] *See* Figure 3, *infra*.

Figure 2: TERP Programs from Enactment to Present[410]

Program Name	Effective Date	Total Grants 2001–Present	Tons of NO_x Reduced	Cost/Ton of NO_x Reduced
Diesel Emissions Reduction Incentive Program	Sept. 1, 2001	$1,013,259,223	171,945	$5,893
Texas Clean Fleet Program	Sept. 1, 2009	$38,813,889	498	$77,998
Texas Natural Gas Vehicle Grant Program	Sept. 1, 2011	$44,049,488	1,573	$28,006
Drayage Truck Incentive Program	Sept. 1, 2013	$3,944,499	233	$16,930
Alternative Fueling Facilities Program	Sept. 1, 2011	$12,832,770	N/A[411]	N/A
Clean Transportation Triangle	Sept. 1, 2011	$11,608,239	N/A	N/A
Clean School Bus Program	Sept. 1, 2005	$33,013,079[412]	N/A	N/A
New Technology Implementation Grants	Sept. 1, 2009	$9,755,620	N/A	N/A

As discussed above, diminishing returns have impacted TERP over time. This can be observed in the increased cost of reducing a ton of nitrogen oxides during the present biennium:

Figure 3: TERP Programs in Present Biennium[413]

Program Name	Total Grants Sept. 2015–Sept. 2016	Tons of NO_x Reduced	Cost/Ton of NO_x Reduced
Diesel Emissions Reduction Incentive Program	$59,764,978	6,145	$9,726
Texas Clean Fleet Program	$7,402,663	87	$85,088
Texas Natural Gas Vehicle Grant Program	$1,872,000	55	$34,036
Drayage Truck Incentive Program	$0[414]	0	0
Alternative Fueling Facilities Program	$3,889,499	N/A[415]	N/A
Clean Transportation Triangle	$1,948,623	N/A	N/A
Clean School Bus Program	$3,890,944[416]	N/A	N/A
New Technology Implementation Grants	$3,543,745	N/A	N/A

As reflected above, not all TERP programs require their grant applicants or the TCEQ to track or attribute nitrogen oxides reductions to the money spent on them. This does not mean they do not contribute indirectly to reductions. For example, in the cases of the Alternative Fueling Facilities Program and the Clean Transportation Triangle, it is likely that the greater access to alternative fuels that these programs provide allow some consumers and businesses to switch from diesel or gasoline to cleaner-burning fuels. When this occurs, reductions in

[410] Texas Commission on Environmental Quality, Personal Communication, Sept. 26, 2016.
[411] Fields marked "N/A" indicate that the program in question does not attempt to track reductions resulting from its grants.
[412] This grant amount included $4.7 million in federal funds.
[413] Texas Commission on Environmental Quality, Personal Communications, Sept. 26, 28, 2016.
[414] The Drayage Truck Incentive Program rules were amended in Fiscal Year 2016 and no grant round was held while the rule amendments were being considered. The full biennial appropriation will be available in the Fiscal Year 2017 grant round.
[415] Fields marked "N/A" indicate that the program in question does not attempt to track reductions resulting from its grants.
[416] This grant amount included $223,604 in federal funds.

emissions result, but not in a way that is measured, or perhaps even measurable, by the TCEQ. Similarly, while the TERP research and development programs and new technology implementation grants may have facilitated advances in technology that reduced emissions, these advances are too attenuated to measure.

TERP programs that incentivize alternative fuels like natural gas can also help the State outside of the context of emissions reductions by encouraging greater use of some of the State's most abundant natural resources. Increased use of alternative fuels like natural gas benefits the Texas economy disproportionately due to the State's large energy sector. If greater adoption of these fuels spreads outside of Texas, the benefit will be compounded. Accordingly, TERP programs that encourage greater use of these fuels may perform a double duty not fully reflected by evaluating them exclusively on the basis of their cost of reducing a ton of nitrogen oxides.

All of TERP's alternative fuel programs will expire in the next biennium without further Legislative action. Accordingly, the 85th Legislature must act to extend them if it wishes to preserve them.

B. Funding Issues

TERP's confusing funding mechanism should be simplified to provide greater transparency to Texans regarding the disposition of the taxes and fees they pay to the State. The Legislature could accomplish this by providing that vehicle certificate of title fees be paid into the TERP Fund. In order to avoid violating the Texas Constitution's protection of the Texas Mobility Fund's revenue streams, the Legislature could then provide that the money presently being transferred out the State Highway Fund and into the TERP Fund instead be transferred into the Texas Mobility Fund. This would satisfy the constitutional requirement that the certificate of title fee revenue that had been taken away from the Texas Mobility Fund be replaced by an equal or greater amount, while keeping the net funding to all programs involved the same.

The growth of the TERP Fund balance warrants the attention of the 85th Legislature. As a general matter, the State should not take more money from its citizens than it plans to use. The fees and taxes paid into the TERP Fund each biennium should be spent on the purpose for which they were collected from the Texans who paid them: to reduce nitrogen oxides emissions and thereby attain the national ambient air quality standards for ground-level ozone.

The 85th Legislature should also consider initiating the process of spending down the balance that has accumulated from previous sessions to help Texas achieve the new 70 ppb ozone standard. In sessions in which TERP appropriations over a certain amount threaten to violate the constitutional spending limit, the Legislature should explicitly state that TERP appropriations beyond that amount are made from the portion of the TERP Fund balance that is attributable to fees. In sessions in which the spending limit is not an issue, the Legislature should explicitly appropriate as much TERP money as possible from the portion of the TERP

Fund balance and that biennium's revenue attributable to taxes, so that the spending limit will be less of a constraint in subsequent sessions.

Unlike the spending limit issue, there is no appropriation strategy the Legislature can use to combat its own tendency to use the unappropriated TERP Fund balance to certify the budget. Honest, transparent budgeting is the only solution to this problem. The Legislature should not continue to appropriate more to some programs than their revenue sources can support and then point to unappropriated balances in unrelated, dedicated accounts like the TERP Fund to claim that the budget is balanced.

III. Recommendations

The Committee finds that, viewed as a whole, TERP is an effective program that serves a critical role in the State's effort to comply with the EPA's ozone standards. Nevertheless, its byzantine funding mechanism, the wide range in efficiencies between its different programs, and the Legislature's history of failing to appropriate all of its revenues limit its effectiveness and warrant attention. With this in mind, the Committee recommends:

1. The 85th Legislature consider legislation extending TERP beyond 2019.

2. The 85th Legislature consider detangling the TERP Fund from the Texas Mobility Fund and the State Highway Fund in a manner that neither reduces TERP Fund revenues nor violates the Texas Constitution's protection of the Texas Mobility Fund's revenue stream.

3. The 85th Legislature consider appropriating a greater portion of TERP Fund revenue in the next biennium and beginning the process of spending down the TERP Fund balance over the next several sessions.

    A. In sessions in which TERP appropriations threaten to violate the spending limit, the Legislature should not decrease the overall amount appropriated, but instead should make the appropriations that would otherwise violate the limit from the portion of the TERP Fund revenues and the TERP Fund balance that is attributable to fee revenue.

    B. In sessions in which violating the spending limit is not a concern, the Legislature should make as much of its TERP appropriations as possible from the portion of TERP Fund revenues and the TERP Fund balance that is attributable to tax revenue, to lessen the impact of the spending limit in subsequent sessions.

    C. The Legislature should appropriate the overwhelming majority of the increased funding to the diesel emission reduction incentive program.

D. The Legislature should explore creating additional TERP programs that cost-effectively reduce nitrogen oxides emissions, especially if those programs also provide additional benefits to the State's economy through increased use of natural gas or other alternative fuels.

Charge No. 3

***Economic Development Incentives*:** *Evaluate the effectiveness and necessity of programs and resources currently used to support economic development in Texas. Make recommendations regarding continuation of effective strategies, modification of existing administrative or regulatory barriers, and the reduction or elimination of ineffective programs.*

I. Background

Providing incentives to businesses has been a mainstay of economic development policy in Texas and elsewhere for decades. But lately, Texas business incentives have been the target of especially intense criticism.[417] Public perception of such programs has diminished with the constant barrage of news coverage[418] reporting the millions, or even billions of dollars in tax incentives being provided to large enterprises while, at the same time, funding always seems to be scarce for schools, roads, foster children, or property tax relief for homeowners and small businesses.[419] The Cato Institute recently stated that the "'tax incentives game to lure corporate investment has gone from being a fairly small one played by a few southern states into a massive competition in which almost every state fears that it will lose investment — either to neighboring states or to other countries — unless it offers similar bribes."[420] Other recent reports indicate that the tide on the economic development incentives race is turning.[421] According to the *Washington Examiner*: "[Several] states have recognized the same thing: Private businesses and entrepreneurs should be profitable on their own based on the value they create for their customers. Not by pursuing government privileges from politicians."[422] According to *Crain's Chicago Business*, "[s]tates and cities have dramatically scaled back taxpayer subsidies to corporations in the past two years, doling out fewer and smaller breaks to lure development projects."[423]

---

[417] *See generally* Robert Wilde, *Elon Musk's $5 Billion in Govt Subsidies Helps Make Ends Meet*, BREITBART, May 31, 2015; Brent Gardner, *Ending the Corporate Welfare Circus*, WALL ST. J., June 5, 2016; Stephen Moore, *Corporate-Welfare Queens*, NAT'L REV., Mar. 27, 2014; Eric Peterson, *OPIC: Corporate Welfare by Any Other Name*, TOWNHALL, Aug. 20, 2015; Jess Fields, *Op-Ed: Corporate Welfare Fails Taxpayers and Small Businesses*, BREITBART, Dec. 3, 2014; Patrick Michels, *Free Lunch*, TEXAS OBSERVER, Mar. 14, 2016.

[418] *See* Tim Jones, *Taxpayer gifts to companies fall 70 percent as states pull back*, BLOOMBERG, Apr. 26, 2016. (stating that "[s]ubsidies are getting more controversial . . . [p]eople are more aware of them because the press pays more attention to them").

[419] Brent Gardner, *Ending the Corporate Welfare Circus*, WALL ST. J., June 5, 2016; Peter Fisher, THE FAILED PROMISE OF THE TEXAS MIRACLE, WORKERS DEFENSE PROJECT, Dec. 2015; David Brunori *Where's the Outrage Over Corporate Welfare?*, FORBES, Mar. 14, 2014; Louise Story, *Lines Blur as Texas Gives Industries a Bonanza*, N.Y. TIMES, Dec. 2, 2012; *Op-Ed: Corporate Welfare Fails Taxpayers and Small Businesses*, BREITBART, Dec. 3, 2014.

[420] Edward Alden, THE TTIP AND "TAX INCENTIVES", CATO INSTITUTE, Sep. 2015.

[421] *See* Mark Niquette, *Business Tax Breaks Draw Review From U.S. States Seeking Revenue*, BLOOMBERG, Mar. 29, 2015 (stating that "states are rethinking tax incentives meant to lure jobs and investment, a staple of economic development for decades, as officials confront budget shortfalls and question the perks' effectiveness").

[422] *States strike a blow against corporate welfare*, Alison Acosta Fraser, Washington Examiner, May 16, 2016.

[423] *See Taxpayer gifts to companies fall 70 percent as states pull back*, CRAIN'S CHICAGO BUSINESS, Apr. 26, 2016, This article originally appeared in Bloomberg, Apr. 26, 2016. Additionally, some states are taking action to address

Proponents of economic development incentive programs claim that incentive programs have a proven track record of growing the economy and creating high-paying jobs. Proponents claim that "[t]o unilaterally disarm yourself of incentives [to offer] will immediately put you at a disadvantage in the marketplace."[424] Opponents claim that incentive programs serve as political gimmicks rather than reliable stimuli for economic growth and job creation. Opponents further claim that Texas would not be disadvantaged without such programs because it is not the incentives drawing new industries to Texas, but the lower taxes on individuals, a consistent regulatory climate, legal reform, and many other factors that have attracted both a steady influx of new residents and new businesses to Texas. The Washington, D.C.-based non-profit, Corporation for Enterprise Development, framed this to-incentivize-or-not dilemma as follows:

> On the one hand, it appears that incentives can make a difference in the site selection process, particularly when the choice comes to two or three similar locations. Moreover, even if the economics are bad, political pressure makes it hard for governors and mayors to ignore the incentives sweepstakes. Indeed, how can any state or locality unilaterally disarm and miss the chance of landing a significant business prospect? Likewise, how can an elected official, such as a mayor or governor, avoid responding with public dollars and policy changes when a company, which has long operated in the state, threatens to leave and accept generous incentives from another jurisdiction? On the other hand, most economists and policy analysts agree that incentives are not good development policy. In using them to attract businesses, cities and states: (1) waste scarce public dollars without creating net new jobs in the vast majority of cases; (2) subsidize the shareholders of these companies for the economic actions they would have taken anyway; (3) foster unfair competition by helping some firms and industries and not others; and (4) divert the attention of policymakers from other issues that could lead to additional job creation and a better business climate.[425]

So far, Texas has opted to continue with its incentive programs as a means of economic development, although some reforms have been made to some programs over time.

---

the need for better evaluations of tax incentives. *See* Jackson Brainerd, *More States to Evaluate Tax Incentives*, NAT'L CONF. OF ST. LEGISLATURES, blog entry, Feb. 12, 2015 (stating that Georgia is looking to form a tax exemption study committee to look at the effectiveness of the state's economic development tax credits and that Nebraska, North Dakota, and Oklahoma have all recently introduced bills that require regular evaluations of economic development tax incentives or would improve the current evaluation process).

[424] *Interim Hearing on Interim Charge No. 3, Before S. Comm. on Natural Resources and Econ. Dev.*, 84th Leg., Apr. 1, 2016 (statement of Bryan Daniel, Executive Director of Economic Development, Office of the Governor).

[425] Bill Schweke, BUSINESS INCENTIVES REFORM, CORP. FOR ENTER. DEV., CFED.org, Dec. 15, 2009.

II. Chapter 313 — Texas Economic Development Act

Below is a discussion of Texas's largest economic development incentive program—the Texas Economic Development Act. The following sections will describe the specifics of the program and why it was created. The Senate Committee on Natural Resources and Economic Development believes this program should receive priority attention from the Legislature during its 85th Regular Session.

A. Program Details

Texas's largest economic development program was created by House Bill 1200 in 2001. The bill added Chapter 313 to the Texas Tax Code and named it the Texas Economic Development Act. Most people refer to the program simply as "Chapter 313."

Chapter 313 allows school districts to offer an entity that plans to build certain kinds of projects a ten-year appraisal limitation on the maintenance and operations portion of its school district property tax. An appraisal limitation means that the entity will only pay property taxes on the value of its property up to the appraisal limitation, as opposed to paying tax on the full market value of the property. For example, if the entity's property were worth $1 billion, and the appraisal limitation were $100 million, then the entity would only pay property taxes on $100 million worth of the property's fair market value for ten years. After the ten-year period expired, the project would be assessed maintenance and operations taxes by the school district at full market value.[426]

According to the Texas Comptroller of Public Accounts ("Comptroller"), businesses that have already been granted Chapter 313 agreements will derive approximately $7.1 billion in tax savings through the lives of their existing agreements, even if the program were to end today and no new agreements were added.[427]

Eligible Industries:

To be eligible for a Chapter 313 appraisal limitation, the project must be devoted to either manufacturing, research and development, clean coal, an advanced energy project, renewable energy electric generation, electric power generation using integrated gasification combined cycle technology, nuclear power generation, or a computer center used primarily in connection with one of the other approved uses. Alternatively, the project is eligible if it is a Texas priority

[426] A school district's property tax rate is made up of a maintenance and operations (M&O) tax rate and, if applicable, an interest and sinking (I&S) tax rate. As its name suggests, the M&O tax rate provides funds for the maintenance and operations costs of a school district. The I&S tax rate provides funds for payments on the debt that finances a district's facilities. *See* SCHOOL FINANCE 101: FUNDING OF TEXAS PUBLIC SCHOOLS, TEX. EDUC. AGENCY, Jan. 2013, p. 8.

[427] This cumulative dollar amount was provided by Texas Comptroller of Public Accounts ("Comptroller") staff on Oct. 26, 2016.

project, meaning it will invest more than $1 billion in any industry.[428] An entity is not eligible if it has been granted a registration number under Sections 151.359[429] or 151.3595[430] of the Texas Tax Code.

Location of Project:

The project must be located on qualified property, which means that the land must be located in an area designated as a reinvestment zone under Chapter 311[431] or 312[432] of the Texas Tax Code, or as an enterprise zone under Chapter 2303, Government Code.[433]

---

[428] TEX. TAX CODE § 313.024.

[429] Section 151.359 of the Texas Tax Code (concerning sales and use taxes) exempts large data centers from having to pay sales and use tax on electricity and certain tangible personal property purchases for 10 to 15 years depending on the size of the capital investment. The purchases exempted from sales and use tax under Tex. Tax Code § 151.359 include electricity, electrical and cooling systems, generators, hardware or a distributed mainframe computer or server, data storage devices, network connectivity equipment, racks, cabinets, raised floor systems, peripheral components or systems, software, mechanical, electrical, and plumbing systems, and any component parts of any of the foregoing, and any services performed on the foregoing tangible personal property. In order to qualify for the exemption, a data center must be at least 100,000 square feet of space in a single building or portion of a single building—meaning that this exemption is functionally reserved for very big businesses. To qualify for the exemption, the data center must create 20 qualifying jobs in the county in which the data center is located and make a capital investment of at least $200 million for the 10-year exemption, or $250 million for the 15-year exemption. The data center must be specifically built or refurbished primarily to house servers and related equipment for processing, storing, and distributing data. This exemption is the result of House Bill 1223 passed in 2013 and should not to be confused with the other big data center sales and use tax exemption passed as a result of House Bill 2712 in 2015. House Bill 2712 was for even bigger businesses and lasts for 20 years. (See next footnote.) House Bill 1223 in 2013 had a five-year fiscal note of nearly $17 million.

[430] Section 151.3595 of the Texas Tax Code (concerning sales and use taxes) exempts extra-large data centers from having to pay sales and use tax on electricity and certain tangible personal property purchases for 20 years. The purchases exempted from sales and use tax under Section 151.3595 of the Texas Tax Code are the same as under Section 151.359. (See previous footnote.) In order to qualify for the exemption, a data center must be at least 250,000 square feet of space in a single building or portion of a single building. To qualify for the exemption, the data center must create 40 qualifying jobs in the county in which the data center is located and make a capital investment of at least $500 million. The bill that created this exemption, H.B. 2712, had a fiscal note which stated: "No significant fiscal implication to the State is anticipated for several biennia. The bill could result in loss of sales tax revenue beginning 15 years after the date a data center is certified as a large data center project." This no-impact-for-15-years fiscal note was accomplished by virtue of the existence of the previously-discussed exemption under Section 151.359 of the Texas Tax Code. This is because the data centers qualifying for the 20-year exemption under Section 151.3595, would also qualify for the 15-year exemption set forth in Section 151.359 (discussed in previous footnote). To read dueling op-eds on the wisdom of such data center incentives, see Charlie Geren's opinion available here: https://www.tribtalk.org/2015/07/16/data-centers-are-a-wise-investment-for-texas/ versus Konni Burton's opinion available here: https://www.tribtalk.org/2015/07/10/stop-throwing-our-tax-dollars-to-big-business/.

[431] Chapter 311 of the Texas Tax Code contains the "Tax Increment Financing Act." Tax increment financing is a tool that local governments can use to publicly finance improvements to infrastructure and buildings within a designated area known as a reinvestment zone. The cost of improvements to the reinvestment zone is repaid by the future tax revenues of each taxing unit that levies taxes against the property. Each taxing unit can choose to dedicate all, a portion of, or none of the tax revenue gained as a result of improvements within the reinvestment zone.

[432] Chapter 312 of the Texas Tax Code contains the "Property Tax Abatement Act." A tax abatement is a local agreement between a taxpayer and a taxing unit that exempts all or part of the increase in the value of the real property and/or tangible personal property from taxation for a period not to exceed 10 years. Tax abatements are an economic development tool available to cities, counties and special districts to attract new industries and to

Minimum Investment; Minimum Taxable Value:

To be eligible, the entity seeking the Chapter 313 limitation must meet certain investment thresholds, depending on how wealthy the school district already is, as follows:[434]

Category	**ISD's taxable property value** This is the total taxable property value in the school district before the new entity comes; this threshold determines the minimum numbers to the right.	**Minimum investment required by new entity** This how much the entity must invest in the school district territory to be eligible for a Ch. 313 agreement.	**Minimum limitation** This is the minimum taxable value that an entity will pay school district M&O taxes on if it is granted a Ch. 313 agreement.
I	≥ $10 billion[435]	$100 million	$100 million
II	≥ $1 billion	$80 million	$80 million
III	≥ $500 million	$60 million	$60 million
IV	≥ $100 million	$40 million	$40 million
V	< $100 million	$20 million	$20 million

Example: Company A wants to construct (or expand) a facility in School District X. School District X already has $5.3 billion worth of taxable property value in the district, as calculated from the preceding tax year. This would make School District X a Category II district, since it has more than $1 billion worth of taxable property, but less than $10 billion. If Company A wants a Chapter 313 agreement to construct in School District X, then Company A must invest at least $80 million into its new project because this is the minimum investment required for a Category II district. This investment can be comprised of buildings, improvements to buildings, equipment, and other tangible personal property. Now assume that Company A plans to invest $600 million in its project. School District X, if it grants the Chapter 313 agreement, must assess maintenance and operations tax on at least $80 million worth of that $600 million property value for 10 years (*i.e.*, the minimum limitation). School District X may choose to tax more of the value per the agreement— for example, $100 million— but it probably will not because it does not have any incentive to (more about this later in "School Finance Affected" section).

---

encourage the retention and development of existing businesses through property tax exemptions or reductions. School districts may not enter into abatement agreements, which is why they enter into appraisal limitation agreements under Chapter 313 instead.

[433] Chapter 2303 of the Texas Government Code contains the "Enterprise Zone" program. This programs allows local governments to nominate a new or expanding business as an "enterprise project." Approved projects are eligible to apply for state sales and use tax refunds on qualified expenditures. The level and amount of refund depends on the capital investment and jobs created at the qualified business site.

[434] TEX. TAX CODE §§ 313.022–23.

[435] Texas has 45 independent school districts (ISDs) that have greater than or equal to $10 billion in taxable value on their rolls.

Property that counts toward the minimum investment:

The following categories of property count toward the minimum investment required:[436]

- Tangible personal property that is any of the following:
  (a) "Section 1245 property";[437]
  (b) Used in connection with the manufacturing, processing, or fabrication in a cleanroom environment of a semiconductor product;
  (c) Used in connection with the operation of a nuclear electric power generation facility;
  (d) Used in connection with operating an integrated gasification combined cycle electric generation facility; or
  (e) Used in connection with operating an advanced clean energy project;
- Buildings (or non-removable components thereof) that house the tangible personal property described above.

The land itself does not count toward the minimum investment thresholds, but the land itself is part of the overall value of the property that will be subject to the appraisal limitation if the Chapter 313 agreement is granted.[438]

Minimum Jobs:

The project in question must create at least 25 new qualifying jobs.[439] "Qualifying job" means a permanent full-time job[440] that was not transferred from one area in this State to another area in this State; was not created to replace a previous employee; is covered by a group health benefit plan; and pays at least 110% of the county's average weekly wage for manufacturing jobs.[441]

---

[436] TEX. TAX CODE § 313.021(1).

[437] This refers to Section 1245 of the Federal Internal Revenue Code. "Section 1245 property" is property that is depreciable or amortizable in nature. For purposes of Chapter 313 qualified investment purposes, "Section 1245 property" includes: Tangible personal or real property (except for buildings and their structural components) used as:

- An integral part of manufacturing, production, or extraction or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services;
- A research facility used in any of the above activities, or
- A facility used in any of the above activities for the bulk storage of fungible commodities.

[438] *See* TEX. TAX CODE § 313.021(2), except that property leased under a capitalized lease may be considered a qualified investment, but not property leased under an operating lease. *See* TEXAS TAX CODE §§ 313.021(1), 313.024(c)(1) – (3).

[439] *See* TEX. TAX CODE § 313.021(2); or 10 full time jobs for certain rural projects. *See* TEX. TAX CODE § 313.051(b).

[440] Full time requires at least 1,600 hours of work per year. TEX. TAX CODE § 313.021(3).

[441] Average weekly wage is the wage in a county for manufacturing jobs during the most recent four quarterly periods for which data is available as computed by the Texas Workforce Commission; or the average weekly wage for manufacturing jobs in the region designated for the regional planning commission, council of governments, or similar regional planning agency created under Chapter 391 of the Local Government Code. Non-qualifying jobs must have an average weekly wage that exceeds the average weekly wage for all jobs in the county. TEX. TAX CODE § 313.021(5).

Related jobs created in connection with the project, including persons employed by third parties under contract, may satisfy the minimum qualifying jobs requirement for the project if the Texas Workforce Commission determines that the cumulative economic benefits to the State of these jobs is the same or greater than that associated with the minimum number of qualified jobs required to be created under Chapter 313. Additionally, the new qualifying jobs that the entity created under a different agreement with another school district may count toward the jobs requirement for the new project under consideration if the Texas Economic Development and Tourism Office determines that the projects covered by the two agreements constitute a single unified project. Chapter 313 also provides that the governing body of a school district may waive the new jobs creation requirement and approve an application if it finds that the jobs creation requirement exceeds the industry standard for the number of employees reasonably necessary for the operation of the facility of the property owner that is described in the application.[442] Since 2007, more than 60% of projects have waived the minimum job requirement. In 55 out of the 119 agreements for which jobs reports were due by the time of this Report's publication, the agreement holders produced less than 10 jobs. In three of those instances, the agreement holders produced zero jobs.[443]

Comptroller Approval for Projects:

A school district is not required to consider a Chapter 313 application, but if it receives an application and is considering approval, the school district must forward the application and proposed agreement to the Comptroller.[444] The Comptroller must review the application and conduct an economic impact evaluation of the investment proposed by the application. The Comptroller must then recommend approval or disapproval to the school district and provide its reasons.[445] The Comptroller's recommendation must be based on the economic impact criteria set out in Chapter 313 and "on any other information available to the Comptroller."[446] Upon approval, the Comptroller issues a certificate for a limitation of appraised value for the property. A school district may not approve an application unless the Comptroller approves the project and issues the certificate.[447]

Auditing Requirements:

Each year, the State Auditor is required to review at least three major agreements to determine whether each agreement accomplishes the legislative purposes of Chapter 313,[448]

---

[442] TEX. TAX CODE § 313.025(f-1).
[443] *See* TEX. COMPTROLLER OF PUB. ACCOUNTS, REP. OF THE TEX. ECON. DEV. ACT, 2015 ("Comptroller's Report"). As of the time of the publication of the Comptroller's Report in 2015, there were 259 reported active agreements, but only 119 of those agreements had jobs reports due.
[444] TEX. TAX CODE § 313.025(b), (d).
[445] TEX. TAX CODE § 313.025(d).
[446] TEX. TAX CODE § 313.026(b).
[447] TEX. TAX CODE § 313.025(d-1).
[448] The legislative purposes of Chapter 313 are as follows:
(1) encourage large-scale capital investments in Texas;

complies with the legislative intent of Chapter 313[449] and complies with the terms of Chapter 313. As part of the review, the State Auditor is required to make recommendations relating to increasing the efficiency and effectiveness of the administration of Chapter 313.[450]

Reporting Requirements:

A project owner who receives a Chapter 313 agreement is required to report annually on its compliance with the minimum investment, jobs creation, and wages portions of its Chapter 313 agreement.[451] The Comptroller then uses this data (and more) to compile a biennial report assessing the progress of all agreements.[452] Two state audit reports have noted the weakness of relying entirely on companies' self-reported information. In November 2014, the State Auditor's Office reported:

---

(2) create new, high-paying jobs in this state;
(3) attract to Texas large-scale businesses that are potentially planning to locate in other states/countries;
(4) enable state/local governments to compete with other states by authorizing economic development incentives that are comparable to incentives being offered;
(5) strengthen and improve the overall performance of the economy of this state;
(6) expand and enlarge the ad valorem tax base of this state; and
(7) enhance this state's economic development efforts by providing state and local officials with an effective economic development tool.

TEX. TAX CODE § 313.003.

[449] The legislative intent of Chapter 313 is as follows:

It is the intent of the legislature in enacting this chapter that:
(1) economic development decisions involving school district taxes should occur at the local level with oversight by the state and should be consistent with identifiable statewide economic development goals;
(2) this chapter should not be construed or interpreted to allow:
(A) property owners to pool investments to create sufficiently large investments to qualify for an ad valorem tax benefit provided by this chapter;
(B) an applicant for an ad valorem tax benefit provided by this chapter to assert that jobs will be eliminated if certain investments are not made if the assertion is not true; or
(C) an entity not subject to the tax imposed by Chapter 171 [i.e., franchise tax] to receive an ad valorem tax benefit provided by this chapter;
(3) in implementing this chapter, school districts should:
(A) strictly interpret the criteria and selection guidelines provided by this chapter; and
(B) approve only those applications for an ad valorem tax benefit provided by this chapter that:
(i) enhance the local community;
(ii) improve the local public education system;
(iii) create high-paying jobs; and
(iv) advance the economic development goals of this state; and
(4) in implementing this chapter, the comptroller should:
(A) strictly interpret the criteria and selection guidelines provided by this chapter; and
(B) issue certificates for limitations on appraised value only for those applications for an ad valorem tax benefit provided by this chapter that:
(i) create high-paying jobs;
(ii) provide a net benefit to the state over the long term; and
(iii) advance the economic development goals of this state.

TEX. TAX CODE § 313.004.

[450] TEX. TAX CODE § 313.010.

[451] TEX. TAX CODE § 313.033.

[452] TEX. TAX CODE § 313.032.

> Oversight [of Chapter 313 agreements] relies primarily on self-reported information that businesses certify . . . To determine whether businesses with agreements complied with . . . Chapter 313, the four school districts audited relied primarily on the certification of the annual eligibility forms and biennial progress reports that businesses submitted to confirm the businesses' capital investment and the number of jobs they committed to create or had created. . . . Chapter 313 does not require school districts to verify that information, and the school districts audited did not perform verifications.[453]

The November 2014 report also noted, in a particularly egregious example of the weakness of the reporting requirements, that Beaumont ISD still had not given the State a copy of an agreement, even after the Comptroller's staff filed an open records request for the document.[454] In August 2015, the State Auditor's Office reiterated its concerns from its 2014 audit report and further stated:

> There are no statutory requirements to verify information that businesses report and certify. . . . Chapter 313 does not require that the compliance and property information that businesses with agreements report to school districts be verified for accuracy and completeness. The school districts audited did not perform verifications.[455]

In any event, the Comptroller compiles the data reported by businesses and then prepares a biennial Report of the Economic Development Act. The Comptroller's 2015 Report of the Texas Economic Development Act contains the following in its Executive Summary:[456]

▪ **Active Projects:** 259[457]	45% manufacturing; 53% renewable energy.
▪ **Dollars Invested:** $123 billion	76% manufacturing; 21% renewable energy; 3% R&D and electric power generation.
▪ **Jobs:** 5,487	89% manufacturing; 10% renewable energy; 1% R&D.
▪ **Estimated gross tax benefit:** $5.5 billion	72% manufacturing; 26% renewable energy; 2% R&D and electric power generation

[453] ST. AUDITOR'S OFF., REP. NO. 15-009, SELECTED MAJOR AGREEMENTS UNDER THE TEX. ECON. DEV. ACT (Nov. 2014), p. i.
[454] *Id*. at p. 5. The Beaumont ISD agreement was entered into before Chapter 313 required Comptroller approval of agreements. Comptroller approval was not required until 2014, after the passage of House Bill 3390 in 2013. *See* H.B. 3390, 83rd Leg., Reg. Sess., (Tx. 2013), *eff*. Jan. 1, 2014.
[455] ST. AUDITOR'S OFF., REP. NO. 15-042, SELECTED MAJOR AGREEMENTS UNDER THE TEX. ECON. DEV. ACT (Aug. 2015), p. 1.
[456] *See* TEX. COMPTROLLER OF PUB. ACCOUNTS, REP. OF THE TEX. ECON. DEV. ACT, 2015. The Comptroller's 2017 biennial Report of the Texas Economic Development Act is expected to be published in January 2017 in advance of the 85th Legislative Session.
[457] According to the Comptroller's staff, a preliminary estimate of the number of agreements that will be in place by the time of the 2017 biennial Report of the Texas Economic Development Act's publication, there will be 311 active Chapter 313 projects.

The Comptroller's 2015 report of the Texas Economic Development Act also contains the following useful charts concerning current agreements and jobs:[458]

TABLE 1: **Current Agreements**

	Number of active projects	Estimated total investment for length of agreement	Reported Investment through 2013	2013 taxable value for M&O if limitation were not in effect	2013 taxable value for M&O with limitation
Manufacturing	116	$93,464,080,342	$42,877,116,975	$13,415,333,330	$3,155,868,721
Research and Development	4	$835,586,619	$835,586,619	$429,368,073	$215,000,000
Clean Coal	0	$0	$0	$0	$0
Advanced Clean Energy	0	$0	$0	$0	$0
Renewable Energy Electric Generation (Wind)	127	$24,486,016,379	$15,249,763,024	$8,854,453,045	$1,950,848,995
Renewable Energy Electric Generation (Non-Wind)	9	$1,342,214,481	$548,988,441	$427,099,755	$40,426,154
Electric Power Generation (Integrated Gasification Combined Cycle)	1	$2,848,413,663	$0	$0	$0
Nuclear Electric Power Generation	2	$0	$0	$0	$0
Total	**259**	**$122,976,311,484**	**$59,511,455,060**	**$23,126,254,203**	**$5,362,143,870**

	Total 2013 taxable value for M&O not on the tax rolls	Estimated tax benefit through 2013	Estimated total gross tax benefit to company through limitation and tax credit for length of agreement
Manufacturing	$10,259,464,609	$468,127,540	$3,996,768,463
Research and Development	$214,368,073	$9,372,978	$20,640,992
Clean Coal	$0	$0	$0
Advanced Clean Energy	$0	$0	$0
Renewable Energy Electric Generation (Wind)	$6,903,604,050	$329,562,244	$1,375,047,870
Renewable Energy Electric Generation (Non-Wind)	$386,673,601	$8,061,176	$77,247,533
Electric Power Generation (Integrated Gasification Combined Cycle)	$0	$0	$70,122,260
Nuclear Electric Power Generation	$0	$0	$0
Total	**$17,764,110,333**	**$815,123,939**	**$5,539,827,118**

[458] TEX. COMPTROLLER OF PUB. ACCOUNTS, REP. OF THE TEX. ECON. DEV. ACT, 2015, p. 3-4.

TABLE 2: **Job Creation Summary**

	Reported number of qualifying jobs created through 2013	Number of qualifying jobs recipient committed to create on	Reported number of total jobs created through 2013	Total reported wages for jobs in 2013
Manufacturing	8,013	4,903	8,308	$493,930,431
Research and Development	101	60	105	$8,694,113
Clean Coal	0	0	0	$0
Advanced Clean Energy	0	0	0	$0
Renewable Energy Electric Generation (Wind)	795	479	820	$46,099,631
Renewable Energy Electric Generation (Non-Wind)	34	45	34	$2,224,256
Electric Power Generation (Integrated Gasification Combined Cycle)	0	0	0	$0
Nuclear Electric Power Generation	0	0	0	$0
Total	**8,943**	**5,487**	**9,267**	**$550,948,431**

School Finance Affected:

School finance is affected by Chapter 313 agreements by the fact that there is presently roughly $17.7 billion worth of property not being taxed by school districts that otherwise would be taxed if it were not for the existence of the Chapter 313 agreements.[459] This number will increase as new agreements are made by school districts and decrease as older Chapter 313 agreements expire each year. Assuming that new agreements are added at the same pace the old agreements expire, then this translates to over $815 million annually in forgone taxes by the school districts who have granted such agreements.[460] School districts do not feel the financial consequences of this loss because the State treats the school districts as though this property value does not exist at all, and funds the school districts accordingly. Thus, school districts do not have any incentive to deny Chapter 313 agreements.[461]

B. Analysis of Proponents' and Opponents' Claims about Chapter 313

Proponents of the Chapter 313 program argue that the value not being taxed by school districts would not be in Texas at all but for the incentives provided by Chapter 313 agreements. They conclude that nothing is really lost to anyone as a result of the agreement. Skeptics respond that most, if not all, of this investment would have occurred without Chapter 313,

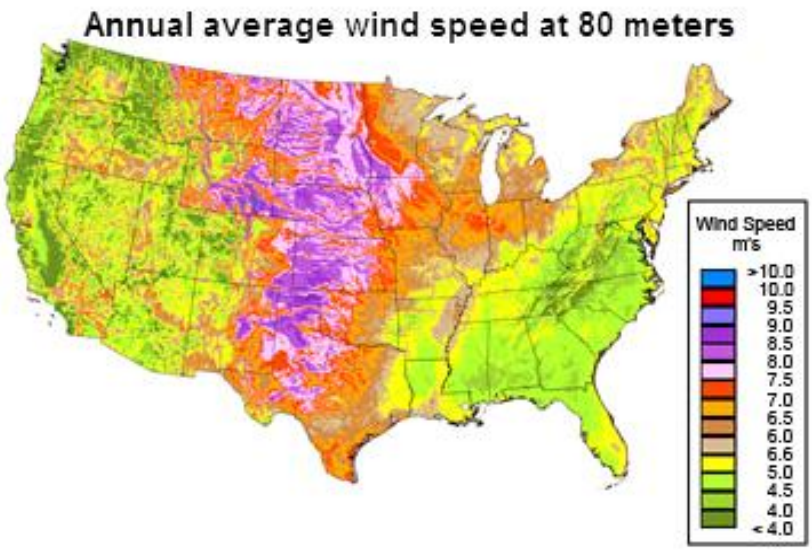
[459] See above, TABLE 1, Current Agreements, 2nd Chart, "Total 2013 taxable value of M&O not on the tax rolls."
[460] See above, TABLE 1, Current Agreements, 2nd Chart, "Estimated tax benefit through 2013." This is a very generous assumption as the preliminary data to be included in the 2017 biennial Report of the Texas Economic Development Act show that ISDs added 75 new agreements just in the last biennium. The program is growing at an exponential rate so the real numbers are likely to be much higher.
[461] Additionally, the Legislative Budget Board concluded in 2011 that, because school districts never lose tax revenue due to an agreement, "there is a *disincentive* … for districts to monitor actual job and wage performance." LEGIS. BUDGET BD., TEX. ST. GOV'T EFFECTIVENESS AND EFFICIENCY, SELECTED ISSUES AND RECOMMENDATIONS, Jan. 2011, p. 1 (emphasis added).

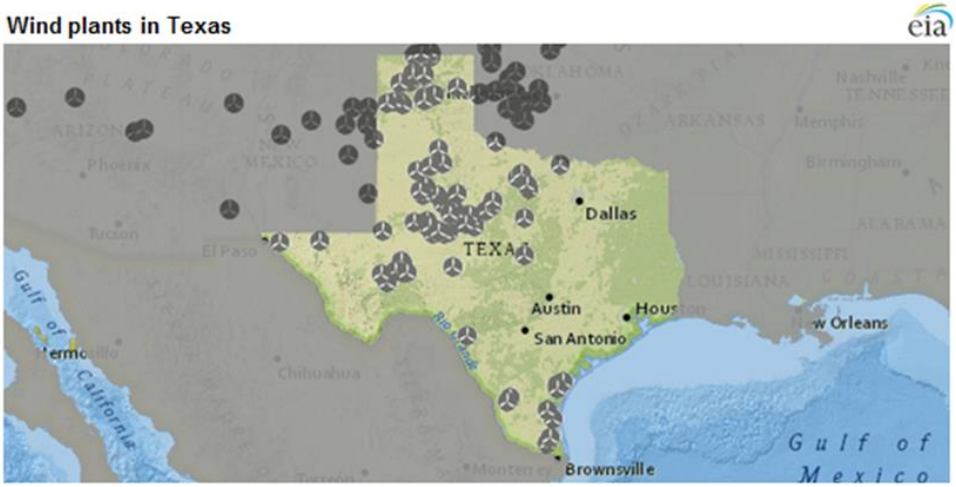
especially in light of the types of entities qualified for Chapter 313. Therefore, they conclude that the money really is lost to the district or the rest of the taxpayers. In order to analyze both of these claims, facts and details regarding Chapter 313 agreements currently in place must be examined.

Out of the 259 projects in place as of May 2014, 127 were wind projects, and 116 were manufacturing.[462] Since these two categories make up the bulk of Chapter 313 agreements, this Report focuses on these two categories.

Wind:

Virtually all of the 127 wind projects that have received Chapter 313 agreements are concentrated in counties which have average wind speeds at an 80-meter hub height of between 7.5 and 9.5 meters per second.[463] See images at right and below.[464] Based upon wind speeds, the north and northwest portions of the State, and the southern coastal areas of the State contain the best locations for wind farms. These are the locations of nearly 100% of Texas's wind farms.

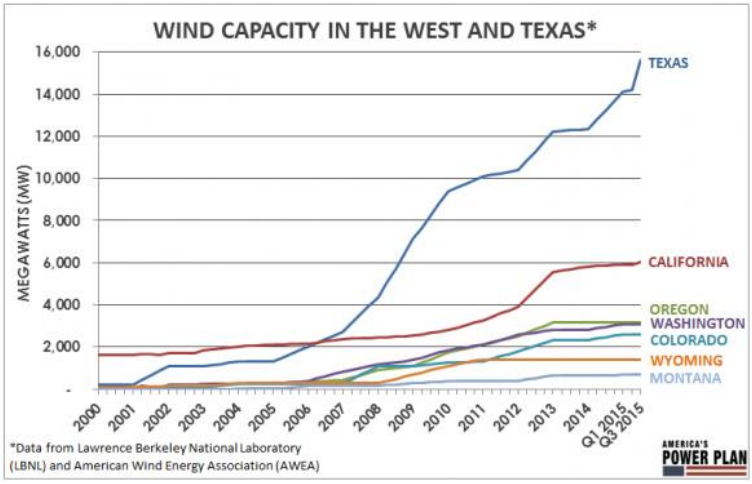




[462] See above, TABLE 1, Current Agreements, 1st Chart.
[463] The 80 meter hub height means the height of the center of the spinning part of a wind turbine from the ground. Typically, the higher the altitude, the faster the speed of the wind. Virginia Lacy, *The Answer is Growing in the Wind*, SOLUTIONS J., ROCKY MOUNTAIN INST., Spring 2010, vol. 3, no. 2.
[464] U.S. ENERGY INFO. ADMIN., TODAY IN ENERGY, Feb. 19, 2015.

As one can also see from the images above, there are many states with comparable wind resources. Texas, however, is especially well positioned to attract wind farms to the State because of two special advantages having nothing to do with Chapter 313: state-financed transmission lines and an isolated grid.

According to Greentech media, the key difference between the regions is Texas's creation of Competitive Renewable Energy Zones (CREZ) in 2008.[465] The CREZ program designated specific areas as priority areas for renewable energy development. The State then spent $7 billion to build large transmission lines to bring more than 18 gigawatts of power from wind-rich regions in the northwestern part of Texas to major load centers, kicking off a renewable energy development bonanza that continues today.[466] As demonstrated from the chart to the right, Texas dramatically separated itself from the herd post-CREZ, not post-Chapter 313.



Unlike the other U.S. electricity markets that cover multiple states, the main Texas electricity grid is operated by the Electricity Reliability Council of Texas (ERCOT). The ERCOT grid serves about three-fourths of the State and is largely isolated from the interconnected power systems serving the eastern and western United States.[467] Therefore, while the other U.S. electricity markets that span multiple states are subject to federal oversight by the Federal Energy Regulatory Commission (FERC) and oversight by multiple state public utility commissions, the ERCOT market is not subject to federal jurisdiction by FERC and is primarily subject to the oversight of one state agency—the Public Utility Commission of Texas (PUCT). Sole PUCT oversight of the ERCOT market allowed for the fast and efficient build-out of transmission lines to move power throughout the State.[468] In just a few years, through the CREZ program, Texas built 3,600 miles of transmission lines. Among the contiguous 48 states, Texas is the only one with a stand-alone electricity grid.[469]

---

[465] Eric Gimon et al., *A Tale of Two Regions: Why Wind Is Booming in Texas and Stalling in the West*, GREENTECH MEDIA, Sep. 23, 2015.
[466] Jim Malewitz, *$7 Billion CREZ Project Nears Finish, Aiding Wind Power*, THE TEX. TRIB., Oct. 14, 2013.
[467] *See* U.S. ENERGY INFO. ASS'N, TEX. STATE ENERGY PROFILE, last updated Jan. 21, 2016. *See also* TEX. ELECTRIC GRIDS: DEMAND AND SUPPLY, TEXAS ALMANAC, TEX. ST. HIST. ASS'N.
[468] Kate Galbraith, *Proudly Independent Texas Power Grid Reaches Out a Bit*, THE TEX. TRIB., Mar. 29, 2012.
[469] Although the data above suggests that wind projects would come to Texas with or without Chapter 313, there is another important point to note about wind projects that have received Chapter 313 agreements: it was brought to the Committee's attention that, not only do wind projects create very few jobs, but some create very little property

Manufacturing:

Out of the 116 manufacturing projects, 83 are school districts that border major ports accessible by of five of Texas's eight federally-maintained ship channels— specifically the Houston-Galveston Ship Channel, Sabine Pass-Neches Ship Channel, Aransas Pass-Corpus Christi Ship Channel, Freeport Ship Channel, and Matagorda Ship Channel. Every project except two within these 83 projects are oil and gas or petrochemical projects.[470] See chart below.

County	ISD	Project	Date
Brazoria (17)	Angleton	Ascend Performance Materials Operations, LLC	08-05-2013
	Brazosport	The Dow Chemical Company	12-03-2002
		The Dow Chemical Company	01-04-2011
		The Dow Chemical Company	04-03-2012
		The Dow Chemical Company	05-01-2012
		The Dow Chemical Company	05-01-2012
		BASF Corporation	05-10-2005
		BASF Corporation	11-05-2012
		Air Liquide Large Industries U.S., LP	12-18-2007
		Dow Agrosciences, LLC	05-01-2012
		Freeport LNG Development L.P. & Affiliates	02-19-2013
		Freeport LNG Development L.P. & Affiliates	02-19-2013
		Freeport LNG Development L.P. & Affiliates	02-19-2013
	Sweeny	ConocoPhillips Company	12-14-2004
		Chevron Phillips Chemical Company, LP	12-31-2013
		Chevron Phillips Chemical Company, LP	12-31-2013
		Phillips 66 Company	14-08-2014
Calhoun (2)	Calhoun County	Formosa Plastics Corporation, Texas	12-10-2007
		Formosa Plastics Corporation, Texas	05-30-2012
Chambers (15)	Barbers Hill	Enterprise Products Operation, LLC	12-14-2009
		Enterprise Products Operation, LLC	12-27-2010
		Enterprise Products Operation, LLC	12-15-2011
		Enterprise Products Operation, LLC	09-23-2013
		Enterprise Products Operation, LLC	09-23-2013
		Enterprise Products Operation, LLC	09-23-2013

value at the end of their appraisal limitations as well. Fifteen wind projects received their Chapter 313 appraisal limitations sufficiently long ago that their agreements have expired and their properties are now being taxed by school districts at "full market value." Of those 15 projects, 11 had depreciated their wind turbines down to less than 50% of their values when their projects were first built. The lack of jobs created by wind projects coupled with their lack of value at the end of the Chapter 313 agreement counsels against allowing wind projects to continue to be eligible for Chapter 313. At the very least, the Legislature may consider reforms that require a minimum percent of the project's value to be taxable at the end of the ten-year appraisal limitation period.

[470] The exceptions are the two projects by Voestalpine Texas LLC in Nueces and San Patricio Counties. According Voestalpine's website, the Voestalpine project is a natural-gas-based direct reduction plant with an annual capacity of 2 million metric tons of Hot Briquetted Iron (HBI). HBI is a high-grade feedstock for the production of high-quality steel grades. See here: http://www.voestalpine.com/texas/en/Project/The-Project.

County	ISD	Project	Date
		Oneok Hydrocarbon, LP	12-12-2011
		Oneok Hydrocarbon, LP	09-23-2013
		Cedar Bayou Fractionators, LP	12-12-2011
		Cedar Bayou Fractionators, LP	12-16-2013
		Lone Star NGL Asset Holdings II, LLC	07-27-2011
		Lone Star NGL Asset Holdings II, LLC	09-23-2013
		Lone Star NGL Asset Holdings II, LLC	12-16-2013
		Exxon Mobil Corporation	10-28-2013
	Goose Creek	Borusan Mannesmann Pipe U.S., Inc.	05-13-2013
Harris (15)	Deer Park	INEOS USA, LLC	08-29-2012
		Equistar Chemicals, LP	04-21-2014
	Goose Creek	Exxon Mobil Corporation	12-10-2012
		Exxon Mobil Corporation	09-23-2013
		Chevron Phillips Chemical Company, LP	10-14-2013
	La Porte	Air Liquide Large Industries, LP	08-17-2010
		Arkema Inc.	08-16-2011
		Oxiteno USA LLC	12-21-2012
		Equistar Chemicals, LP	09-10-2013
		Noltex, LLC	09-10-2013
		Celanese Ltd	10-08-2013
		Linde Gas North America LLC and Affiliates	11-12-2013
		Lub-Line Corp.	05-13-2014
	Sheldon	Equistar Chemicals, LP	08-20-2013
		FMC Technologies, Inc.	04-15-2014
Jackson (3)	Edna	DCP Midstream, LP	02-20-2012
		Flag City Processing Partners, LLC	08-08-2012
	Ganado	ETC Texas Pipeline, LTD.	05-23-2012
Jefferson (19)	Beaumont	Exxon Mobil Corporation	09-18-2003
		Atofina Chemical, Inc.	09-18-2003
		Lucite International, Inc.	12-20-2012
		Pandora Methanol, LLC	12-20-2012
		Natgasoline, LLC	12-19-2013
		BASF Corporation	05-15-2014
	Nederland	Sunoco Partners NGL Facilities, LLC	09-16-2013
	Port Arthur	Motiva Enterprises LLC	01-25-2007
		TE Products Pipeline Company, LLC	12-13-2007
		The Premcor Refining Group Inc.	12-20-2002
		The Premcor Refining Group Inc.	12-01-2004
		The Premcor Refining Group Inc.	12-18-2008
		Praxair, Inc.	11-18-2003
		Praxair, Inc.	08-23-2012
	Port Neches-Groves	Sabina Petrochemicals LLC, ATOFINA Petrochemicals Inc., and BASF Corporation	12-10-2002
		Total Petrochemicals USA, Inc., and Total	12-09-2008

County	ISD	Project	Date
		PAR LLC	
		Huntsman Petrochemical, LLC	09-16-2013
		Air Liquide Large Industries US LP	05-12-2014
	Sabine Pass	Golden Pass LNG, LLC	07-21-2006
Matagorda (1)	Van Vleck	Maverick Tube Corporation DBA Tenaris USA	11-18-2013
Nueces (5)	Calallen	Equistar Chemicals, LP	12-20-2013
		TexStar Midstream Services LP	12-20-2013
	Corpus Christi	Voestalpine Texas LLC	04-28-2014
		Corpus Christi Liquefaction, LLC	04-28-2014
	Tuloso-Midway	M&G Resins USA, LLC	11-18-2013
San Patricio (6)	Gregory-Portland	TPCO America Corporation	11-15-2011
		Corpus Christi Liquefaction, LLC	02-18-2014
		Corpus Christi Liquefaction, LLC	02-18-2014
		Corpus Christi Liquefaction, LLC	02-19-2014
		Voestalpine Texas, LLC	12-17-2013
	Ingleside	Ingleside Ethylene, LLC & Occidental Chemical Corporation	12-30-2013
TOTAL = 83			

The Houston-Galveston Ship Channel leads to the Port of Houston, which is the second largest port in the United States. The channel and surrounding areas support the second-largest petrochemical complex in the world. Additionally, the Houston-Galveston Ship Channel has two of the four largest refineries in the United States— Baytown and Texas City.

The Baytown refinery is owned by ExxonMobil. It is the second largest petroleum and petrochemical complex in the United States and the eighth largest in the world. It has a processing capacity of 584,000 barrels a day. The refinery was established in 1919 and commenced operations in 1920. It is spread across 3,400 acres along the Houston Ship Channel. The chemical plant at the refinery began operating in 1940. The refinery produces jet fuel, diesel, refinery gas, propane, chemical feedstocks, oils, gasoline, and petroleum coke.[471] The main complex occupies five square miles and integrates two chemical plants, a regional engineering office, and a global technology center.[472]

[471] Petroleum coke ("petcoke") is one of many valuable byproducts of the oil refining process. Crude oil is processed into gasoline, diesel fuel, jet fuel, lubricating oils and waxes, leaving some residual crude that usually undergoes additional processing. The crude residue may be further refined by a process known as coking to produce transportation fuels as well as "petcoke," which has a variety of uses as an alternative, cost-effective fuel. See Petroleum Coke Overview, American Fuel & Petrochemical Manufacturers, available at: http://education.afpm.org/refining/petroleum-coke/

[472] *Top 10 large oil refineries*, HYDROCARBONS-TECHNOLOGY.COM, KABLE, Sep. 30, 2013.

The Texas City refinery is owned by Marathon Petroleum.[473] It is the fifth largest refinery in the United States and the 13th largest in the world. The refinery was built in 1931 and purchased in 2013 by Marathon. It has a refining capacity of 86,000 barrels per day, and its products include gasoline, chemical-grade propylene, propane, aromatics, slurry, and dry gas.

Refining and petrochemicals are typically dependent on natural gas and other hydrocarbon derivative products as both feedstocks and fuels. Thus, supporting the industry around the Houston Ship Channel is a complex of several thousand miles of pipeline connecting 200 chemical plants, refineries, salt domes and fractionation plants along the Texas Gulf Coast, which allows transfer of feedstocks, fuel, and chemical products among plants, storage terminals, and transportation facilities.

The Sabine Pass-Neches Ship Channel leads to the Port of Port Arthur, which is also among the largest ports in the United States. The channel and surrounding areas support facilities and refineries along the ship channel which store the majority of the nation's strategic oil reserves, produce the majority of the nation's commercial jet fuel, and produce the majority of US military jet fuel. The area is positioning itself to also become the largest LNG exporter in the United States and is able to handle the bigger ships traveling to and from the widened Panama Canal. The ship channel is deep enough to accommodate the largest cargo ships and petro-chemical tankers. Additionally, the Sabine Pass-Neches Ship Channel has the largest refinery in the United States— Port Arthur.

The Port Arthur Refinery is owned by Motiva Enterprises, which is a 50/50 joint venture between Royal Dutch Shell and Saudi Aramco. It is the largest refinery in the United States and the sixth largest refinery in the world. It has a total processing capacity of over 600,000 barrels per day. The refinery started operations in 1903 and played an important role in the production of high-octane aviation fuel during World War II. The refinery produces gasoline, distillates, jet fuel, lubricant base oils, and chemicals and solvents. The refinery includes a catalytic reformer at the new three-unit naphtha processing complex, which converts 85,000 barrels per day into high octane gasoline for blending.[474]

The Aransas Pass-Corpus Christi Ship Channel leads to the Port of Corpus Christi, which is a major petroleum and natural gas production center. The port is the fifth largest in the United States by tonnage; it is 70 miles south of the Eagle Ford shale play; and it is the deepest channel on the Gulf of Mexico. Heavy industry abounds in the area, with oil refineries, smelting plants, chemical works, and food processing establishments scattered throughout the city and its

---

[473] Marathon announced in early 2016 it is committed to a $2 billion plan to expand and integrate its two Galveston area refineries. Through 2020, Marathon Corp. said it will upgrade its Galveston Bay and Texas City refineries and combine them, creating the nation's second largest refining complex. It will be interesting to see whether Marathon applies for a Chapter 313 agreement for the consolidation of two refineries already located in Texas, and on the Houston-Galveston Ship Channel. *See* Jordan Blum, *Marathon Petroleum Invests In $2 Billion Refining Expansion*, HOUSTON CHRON., Feb. 3, 2016.

[474] *Top 10 large oil refineries*, HYDROCARBONS-TECHNOLOGY.COM, KABLE, Sep. 30, 2013.

outlying regions. Eagle Ford Crude arrives by truck, pipeline, and rail to be loaded onto US-flagged coastal barges and tankers. The area has six oil refineries, including those owned by Valero Energy Corp., Citgo Refining & Chemical Inc., and Flint Hills Resources LP.[475] There are also 1,500 wells located near the bay, as well as a large supply of natural gas.

Similar descriptions can be made of the Freeport and Matagorda Ship Channels, although these are slightly smaller.

In sum, it appears that both the wind projects and the manufacturing projects, which collectively account for 94% of all Chapter 313 agreements, have ample reasons for locating in Texas aside from Chapter 313. This conclusion is consistent with recent examples from the Rio Grande Valley. Two large LNG projects (Annova and NextDecade), whose Chapter 313 applications were rejected by the Point Isabel ISD school board, continue to develop their LNG projects after being denied a Chapter 313 agreement. Additionally, one of the nation's top six new manufacturing projects of 2015— a new Daikin Industries factory in Houston that will manufacture ducted and ductless HVAC products— did not seek a Chapter 313 agreement.[476] The Daikin Industries plant is relocating to Texas from Tennessee, and investing a half billion dollars in the new four-million-square-foot facility. The factory will eventually employ over 5,000 people, and it will be the largest tilt-wall building in the world. A company spokesperson stated: "Our selection of Houston for our new campus was a result of careful analysis and business considerations. . . It offers an outstanding combination that includes the ability to provide an educated workforce, economic growth and a favorable year-round climate necessary for manufacturing and operational excellence."

C. Why was Chapter 313 created?

i. *Site Selection* Magazine

In 2001, the House Research Organization bill analysis for House Bill 1200 (which created the Chapter 313 program) contained the following explanation in the "SUPPORTERS SAY" section:

> Texas is falling behind other states in attracting major new industrial projects. According to the authoritative *Site Selection* magazine, Texas has dropped from first in 1990 to 37th in 2000 in terms of new manufacturing facilities. Since 1997, Texas has lost at least 12 major projects to other states that would have invested more than $4.5 billion and created approximately 5,200 new jobs.[477]

---

[475] Rachael Seeley, *Port Corpus Christi emerges as a growing transportation and storage hub for crude oil from Eagle Ford shale*, OIL & GAS J., Apr. 16, 2014.
[476] *2016 US Investment Monitor: Tracking mobile capital investments during 2015*, ERNST & YOUNG, p. 15; Dale King, *Daikin Adds 1,000 Employees to Hiring Plan at New 4 Million SF Factory in Houston*, REALTY NEWS REP., Mar. 8, 2016.
[477] H. RES. ORG., Bill Analysis, H.B. 1200, 77th Leg., Reg. Sess. (Tx. 2001), p. 7.

The Texas Taxpayers and Research Association (TTARA) reiterated these statements in one of its publications in support of Chapter 313:[478]

> [House Bill 1200] was offered in response to Texas losing a number of major new industrial projects to other states— events largely attributable to the state's high property tax burden, and in particular, local school property taxes.
>
> School districts had at one time been able to offer tax abatements similar to those of cities and counties, but this authority was repealed in the mid 1990s.[[479]] With the loss of school tax abatement authority, Texas fell from the nation's top industrial location in 1996, as ranked by *Site Selection* Magazine, to 37th in 2000. Over those years, Texas lost 12 major facilities to other states—4 to Oklahoma alone.

The Texas Conservative Coalition Research Institute made similar statements in one of its publications concerning Chapter 313:[480]

> After the ability of school districts to offer tax abatements was repealed in the mid-1990's, Texas fell from the nation's top industrial location in 1996, as ranked by Site Selection Magazine, to 37th in 2000.

The original source of the claim that Texas fell to 37th place appears to be a witness who testified in favor of H.B. 1200 at the Texas House Committee on Ways and Means hearing on March 14, 2001. The statistic has since been repeated dozens of times since 2001 by journalists and special interest groups.[481] The statistic seemed suspicious because, in the four years leading

---

[478] *Questions and Answers About the Texas Economic Development Act: Tax Code Chapter 313*, TEX. TAXPAYERS & RES. ASS'N, Dec. 8, 2010, p. 1. *See also Texas Taxes and Manufacturing: Impacts on Capital Investment and R&D*, TEX. TAXPAYERS & RES. ASS'N, Nov. 12, 2012, p. 10 (making the same statements).

[479] The Committee assumes that TTARA is referring to Senate Bill 7, passed on May 31, 1993. Senate Bill 7 was an emergency bill that went into effect immediately in order to meet a court-imposed deadline for establishing a constitutional finance system for Texas schools, or what became known as the "Robin Hood" plan. Senate Bill 7 did not disallow school district tax abatements at that time, it simply removed school districts' incentive to grant them. Senate Bill 7 did this by making it so that the value of the property abated would be counted as part of the districts' taxable value when determining the districts' taxable wealth for school funding purposes. Prior to 1993, if a school district entered into an abatement agreement, the value of the abatement was excluded from the district's total property value as certified by the State Comptroller's office (similar in effect to what occurs now). Accordingly, granting the abatement would result in a wash for the school district because the district would just receive from the State essentially the same money it abated to the taxpayers through an incentive. With S.B. 7, the Texas Legislature changed the law and directed the Comptroller's office not to exclude the value of any abatement granted after May 1993. After that, generally, school boards did not grant abatements because if they did, they would be funded as though they were collecting property taxes on the full value in their districts even if they were not. In other words, they would have to pay for their own abatements.

[480] *A Rev. of Select Tex. Econ. Incentives, Pol'y Whitepaper*, TEX. CONSERVATIVE COALITION RES. INST., Feb. 2013, p. 9.

[481] The number of sources that have cited this "37th place" statistic are too numerous to list here, but this statistic was repeated most recently at a Texas Public Policy Foundation forum held on October 12, 2016, by the representative of a major business association lobby group, where he cited this statistic not once, but three times in an effort to persuade attendees that the Chapter 313 program is essential to recruiting new industry to Texas.

up to 2001, *Site Selection* magazine had ranked Texas 1st, 4th, 6th, and 5th in new manufacturing (for years 1997, 1998, 1999, and 2000 respectively).[482] Thus, falling to 37th place virtually overnight would be improbable. Fact-checking research in preparation for this Report revealed that this information was in fact inaccurate. *Site Selection*'s March 2001 issue contained the following paragraph in the cover page story:

> **New Manufacturing Plants:** While Michigan secured the top spot in the total number of new manufacturing plants in 2000, with 282, California was not far behind, tallying 238. Also generating a high number of new manufacturing plants last year were third-place Ohio (206), followed by Pennsylvania (126), New York (117), Illinois (113), North Carolina (97), **Texas (71)**, Louisiana (68), Minnesota and Alabama (both with 55). In terms of consistency over time, however, California is the clear leader in producing new manufacturing facilities. For the most recent three-year period (1998-2000), the Golden State topped the charts with 980 new manufacturing projects, more than 100 ahead of second-place Ohio, which had 863. Rounding out the top 10 states in this category were Michigan (805), North Carolina (346), Illinois (343), Texas (319), New York (280), Pennsylvania (264), Minnesota (184) and Virginia (169).[483]

This paragraph clearly establishes that **Texas was ranked 8th in new manufacturing plants in 2001 based on year 2000 data by *Site Selection* magazine**. However *Site Selection*'s March 2001 issue also included the following conflicting chart:

---

[482] *New Corp. Facilities & Expansions*, 1994-96, SITE SELECTION MAG., Feb./Mar. 1997; *data available at*: http://siteselection.com/sshighlites/0297/0297CHARTS/pg05.htm, *and* http://siteselection.com/sshighlites/0297/0297CHARTS/index.htm; Jack Lyne, *Mich., Midwest Set Fast-Track Pace in 1997's Rec .U.S. Race for Corp. Facilities*, SITE SELECTION MAG., Feb./Mar. 1998; Jack Lyne, *Mich. Nips Cal. for 1998 Governor's Cup as Records Shatter*, SITE SELECTION MAG., Mar. 1999; Jack Lyne, *Mich. Tops the Bus. Expansion Mountain, 'Threepeats' for SS Governor's Cup*, SITE SELECTION MAG., Mar. 2000.

[483] Ron Starner & Tracy Heath, *It's MICH*-AGAIN!, SITE SELECTION MAG., Mar. 2001 (emphasis added). Note that this paragraph identifies both the top ranking states for manufacturing for the year 2000, and the top ranking states for manufacturing for the 3-year period of 1998 to 2000 (in an attempt to rank based upon consistency, rather than performance in individual years). Thus, as reported in 2001, the top ten for the year 2000 and the top ten for the period 1998-2000 for new manufacturing plants were as follows:

New Manufacturing 2000	**New Manufacturing 1998-2000**
1 Michigan	1 California
2 California	2 Ohio,
3 Ohio	3 Michigan
4 Pennsylvania	4 North Carolina
5 New York	5 Illinois
6 Illinois	**6 Texas**
7 North Carolina	7 New York
8 Texas	8 Pennsylvania
9 Louisiana	9 Minnesota
10 Minnesota and Alabama (tie)	10 Virginia

New Corporate Facilities and Expansions — 1998-2000

		2000 NEW MFG.	98-00 NEW MFG.	2000 MFG. EXP	98-00 MFG EXP	2000 OTHER FACIL.	98-00 OTHER FACIL.	2000 NON-U.S.	98-00 NON-U.S.	2000 TOTAL	98-00 TOTAL
NEW ENGLAND	Connecticut	0	7	1	8	7	23	1	5	8	38
	Maine	10	28	7	23	39	120	1	3	56	171
	Massachusetts	7	30	4	21	4	36	1	2	15	87
	New Hampshire	3	7	1	2	2	4	0	0	6	13
	Rhode Island	1	7	1	4	1	11	0	0	3	22
	Vermont	0	4	1	6	0	5	0	0	1	15
	Region Totals	**21**	**83**	**15**	**64**	**53**	**199**	**3**	**10**	**89**	**346**
MIDDLE ATLANTIC	New Jersey	8	7	10	14	40	88	7	8	58	119
	New York	113	387	247	972	761	1,722	1	8	1,121	3,081
	Pennsylvania	125	285	211	495	296	636	0	5	632	1,416
	Region Totals	**246**	**689**	**468**	**1,481**	**1,097**	**2,446**	**8**	**21**	**1,811**	**4,616**
EAST NORTH CENTRAL	Illinois	115	391	77	294	371	1197	14	20	563	1,882
	Indiana	16	92	24	184	11	83	5	13	51	359
	Michigan	204	760	868	2,256	1,286	3,239	95	212	2,358	6,255
	Ohio	206	606	273	971	652	1848	69	110	1,131	3,425
	Wisconsin	15	72	19	62	40	141	1	3	74	275
	Region Totals	**556**	**1,921**	**1,261**	**3,767**	**2,360**	**6,508**	**184**	**358**	**4,177**	**12,196**
WEST NORTH CENTRAL	Iowa	10	59	34	123	12	80	2	9	56	262
	Kansas	3	21	7	8	10	38	2	3	20	77
	Minnesota	55	208	57	129	195	851	0	0	307	1,188
	Missouri	26	52	56	229	67	170	0	3	149	451
	North Dakota	0	5	7	24	11	24	0	2	18	53
	Nebraska	12	19	4	32	12	36	1	3	28	87
	South Dakota	1	7	3	22	2	23	0	0	6	52
	Region Totals	**107**	**371**	**168**	**577**	**309**	**1,222**	**5**	**20**	**584**	**2,170**
SOUTH ATLANTIC	Dis. of Col.	0	0	0	0	0	4	0	0	0	4
	Deleware	2	3	0	0	4	12	0	0	6	15
	Florida	45	158	58	172	128	748	2	8	231	1,078
	Georgia	20	109	12	91	39	292	1	28	71	492
	Maryland	4	26	5	25	22	200	0	4	31	251
	North Carolina	97	346	354	1,354	150	738	11	93	601	2,438
	South Carolina	8	154	127	428	45	128	49	144	210	710
	Virginia	45	169	99	247	230	778	38	96	374	1,194
	West Virginia	31	67	44	117	27	76	0	2	102	260
	Region Totals	**282**	**1,032**	**699**	**2,434**	**645**	**2,976**	**101**	**375**	**1,626**	**6,442**
EAST SOUTH CENTRAL	Alabama	57	147	121	353	22	53	2	12	200	553
	Kentucky	30	144	132	426	56	189	3	22	218	759
	Mississippi	29	87	69	150	21	47	3	5	119	284
	Tennessee	52	94	136	190	138	206	3	13	326	490
	Region Totals	**68**	**472**	**458**	**1,119**	**237**	**495**	**11**	**52**	**863**	**2,086**
WEST SOUTH CENTRAL	Arkansas	9	49	25	153	10	29	1	2	44	231
	Louisiana	68	104	236	287	132	165	0	1	436	556
	Oklahoma	11	45	18	70	19	55	1	4	48	170
	Texas	3	331	137	510	439	1,673	7	31	649	2,514
	Region Totals	**161**	**529**	**416**	**1,020**	**600**	**1,922**	**9**	**38**	**1,177**	**3,471**
MOUNTAIN	Arizona	8	52	4	46	25	167	1	3	37	265
	Colorado	8	23	11	20	24	76	1	2	43	119
	Idaho	0	7	3	8	4	12	0	0	7	27
	Montana	1	2	3	3	3	3	0	0	7	8
	New Mexico	1	9	4	6	3	22	0	1	8	37
	Nevada	5	22	0	1	6	40	0	0	1	63
	Utah	1	4	2	7	8	13	0	0	11	24
	Wyoming	0	2	2	4	1	4	0	0	3	10
	Region Totals	**24**	**121**	**29**	**95**	**74**	**337**	**2**	**6**	**127**	**553**
PACIFIC	Alaska	0	2	0	0	1	14	0	1	1	16
	California	252	980	58	481	1,138	3,796	21	73	1,448	5,257
	Hawaii	1	2	0	0	0	2	0	0	1	4
	Oregon	4	14	3	5	1	3	2	2	8	22
	Washington	5	20	2	7	10	30	1	1	17	57
	Region Totals	**262**	**1018**	**63**	**493**	**1,150**	**3,845**	**24**	**77**	**1,475**	**5,356**
	U.S. Totals	**1,827**	**6,236**	**3,577**	**11,050**	**6,525**	**19,950**	**347**	**957**	**12,529**	**37,236**

NOTE: **NON-U.S.** facilities are broken out separately for analysis purposes. However, **NON-U.S.** facilities are also included in the totals for **NEW MFG., MFG. EXP.** and **OTHER** facilities, as well as in the overall totals for 1999 and 1997-99. **OTHER** facilities include offices, headquarters, distribution centers, research and development facilities, speculative offices, speculative industrial buildings, mixed-use facilities and hotels.

Source: Conway Data Inc.'s New Plant Database.

The first column on this chart indicates that Texas only gained three new manufacturing facilities in the year 2000. This number contradicts the information stated in the paragraph cited above from the same *Site Selection* issue on the cover page story, which was that Texas gained 71 new manufacturing facilities in the year 2000.

If the number 3 had been correct, then Texas really would have been ranked 37th in the year 2001 in new manufacturing. But this number was clearly erroneous. The numbers do not add up when the totals across the four categories for the year 2000 are summed.[484] The numbers 3 + 137 + 439 + 7 only add up to 586. Texas had 649 total facilities for 2000, which also gave Texas 5th place for the Governor's Cup in 2001.[485] (See the chart at right also taken from the March 2001 issue.) The fact that the cover page story stated that Texas had 71 total new manufacturing facilities, and the fact that the math on the chart does not add up proves it unequivocally. *Site Selection* magazine has since acknowledged the error.[486] The unavoidable conclusion is that the case for passing the largest economic development incentive program in the State's history may have been based on the fear incited by a magazine's typographical error.

2000's Top 10 States: New/Expanded Facilities

1.	MICHIGAN	2,358
2.	CALIFORNIA	1,448
3.	OHIO	1,131
4.	NEW YORK	1,121
5.	TEXAS	649
6.	PENNSYLVANIA	632
7.	NORTH CAROLINA	601
8.	ILLINOIS	563
9.	LOUISIANA	436
10.	VIRGINIA	374

There has always been a close correlation between the rankings for "new manufacturing plants" and the rankings for total "new/expanded facilities," which determines the winner of the Governor's Cup. The industry experts who testified in favor of H.B. 1200 should have realized that Texas could not have received 5th place in the Governor's Cup at the same time it was 37th in new manufacturing.

Although the error may have been in good faith, it was especially egregious in light of the fact that, not even six months earlier, in the September 2000 issue, *Site Selection* magazine published a ten-article spread about Texas, proclaiming Texas to be a "global powerhouse" that was "drawing new investment from virtually all industry sectors." Highlights from the September 2000 issue of *Site Selection* magazine included the following:[487]

- No state has benefited more from the 1994 approval of the North American Free Trade Agreement (NAFTA) than Texas;

---

[484] The four categories that make up the 2000 total were: 2000 new manufacturing, 2000 manufacturing expansions, 2000 other facilities, and 2000 non-U.S. facilities. *See* chart on previous page, "New Corporate Facilities and Expansions −1998-2000."

[485] Since the 1980s, *Site Selection* magazine has ranked the top ten states in "new/expanded facilities" in order to award the top state the "Governor's Cup." The Governor's Cup award has always been given in its March issue, and it has always been based upon data for the previous year. So, a March 2001 win, for example, would be based upon year 2000 data. By at least 1994, *Site Selection* magazine had added a new category to rank, and that was the top ten states for "new manufacturing." This new category winner was also identified in the March issue each year, but it was more of a bonus piece of information. It did not determine the winner of the Governor's Cup. In 1998, *Site Selection* magazine added a few more categories, two of which were: "state business climate" and "corporate survey." The winners of these two new categories were identified in the November issue of *Site Selection* each year, but again, they did not determine the Governor's Cup winner. The "new/expanded facilities," was and always has been the category for the big win.

[486] Telephone interview with Karen Medernach, Editorial Database Manager, Conway/Site Selection (Oct. 10, 2016).

[487] Richard Westlund, *Texas: Where High-Tech Meets High-Touch*, SITE SELECTION MAG., Special Feature, Sep. 2000.

- International access, a high-touch labor pool and wide-open spaces are just a few of the Lone Star State's advantages for growing businesses;
- Texas has seen its manufacturing jobs growing at a rapid clip, especially in the technology sectors, and listing as evidence among others:
    - Atmel (semiconductor manufacturing firm based in San Jose, CA) is investing $1 billion in renovating a 650,000 sq. ft. facility in Irving; to do so, Atmel acquired the former Hitachi plant in December 1999, and is ramping up to create 1,000 immediate jobs with 2,500 jobs forecast by 2003
    - TurboCare, a turbine machinery remanufacturing and repair company, recently announced a 175 job expansion of its Houston area operations. "We are centrally located to serve both our domestic and international customers," says Jim Williams, general manager of Houston Services. "The cost of living, the ability to recruit high caliber employees and the work force in general is very good here."
    - Rudolph Miles & Sons opened a 126,000 sq. ft. distribution facility in February at the Sharyland Business Park in McAllen, near the Mexican border. "The new center was built to help fill the need of one of our existing customers," says John Dillon, real estate manager for the firm. "This is part of our future and will help us capitalize on increased trade with Mexico."
- Texas offers a long list of reasons for companies to relocate or expand in the Lone Star State, beginning with a high quality of life. From country music to symphonies, from the Dallas Cowboys to stock car racing, Texas has a "ten-gallon" appeal to people with a wide range of individual tastes. Professional sports, museums and cultural activities abound in Dallas Fort Worth, Houston and San Antonio, while the state capital of Austin has long been known for its dynamic music industry. Padre Island National Seashore on the Gulf Coast, the "piney woods" of northeastern Texas and Big Bend National Park on the Rio Grande are just three of the state's countless outdoor attractions.
- For the past decade, the Dallas-Fort Worth Metroplex has led the nation in corporate relocations and expansions. One recent arrival is Chase Manhattan Bank's Global Investor Services Division, which is relocating from Manhattan to the Farmer's Branch community north of Dallas, bringing more than 1,400 new jobs. In June, SBC Communications, Southwestern Bell's parent company, announced that it will be developing a new 150,000 sq. ft. office facility in Dallas for 1,000 workers, with potential for a second building of similar size.
- Last year (in 1999), Ameritrade Holding Corp. opened a 140,000 sq. ft. service brokerage service north of Fort Worth. Since opening, the new facility houses more than 1,200 jobs. Ameritrade said the relocation decision was based on the quality of work force, business suitability and overall quality of life in the Fort Worth area.
- In February (2000), Galderma Laboratories, a pharmaceutical subsidiary of L'Oreal and Nestle, held a ground breaking for its U.S. headquarters north of Fort Worth as well.
- Mother Parker's Tea & Coffee, a Toronto company, recently picked Fort Worth for its only U.S. manufacturing facility, and Valio, a French multinational, has also established a manufacturing facility in the area.

- The Houston area is expected to add more than 60,000 new jobs this year (2000) up from 47,000 in 1999 in industries like energy, aerospace, telecommunications, life sciences and information technology.
- One new manufacturer is Japanese owned SPF Corp. of America, which makes corrosion resistant metal equipment. The company is establishing operations in northwest Houston and will employ more than 25 people initially. "Houston was the logical site for us to reach our customers," says SPF President and CEO Yosuhiro Senda. "With the Port of Houston nearby, easily accessible rail service, and an extensive highway system, our global market is more easily accessible."
- Mikron Technology is building its first U.S. plant in San Antonio with 400 high tech positions. "Our business is growing so fast that we have high expectations for this plant," says Steinar Faanes, president and chief operating officer of Mikron Infocom Technology. "There is good access to a skilled work force, and it's also a good place to live."
- In addition to telecom and computer manufacturing, San Antonio is seeing strong growth among its bioscience companies, as well as IT and e-commerce firms. Telecom Real Estate Services is building a165,000 sq. ft. switch hotel, and NextLink and COLO.com, are leasing a 100,000 sq. ft. facility designed specifically for telecom and Internet firms. Another IT asset is the Informational Warfare Center (IWC), which conducts computer security operations for the U.S. Air Force (and listing multiple other expansions and relocations in San Antonio).
- Boeing has expanded its defense related manufacturing plant in El Paso from 200 to 1,200 employees in the past two years.
- Aerobotics Industries, a supplier of aerospace engineering, tooling, prototyping and machined components, is building a 400,000 sq. ft. facility in Abilene that will allow it to diversify into heavy fabrication products for other transportation industries.
- Zoltek Cos., a manufacturer of carbon fiber for the military and aerospace industries, is expanding its 100,000 sq. ft. Abilene plant from 50 to 250 employees in the next five years.
- Bell Helicopter is building V22 Osprey tilt-rotor helicopters in its new Amarillo plant. Plans call for major expansions of the facility's 150,000 sq. ft. plant and 72,000 sq. ft. hangar by 2002, with corresponding growth in the 178 person work force.
- El Paso is also attracting major call centers. Brylane opened an 850 employee center serving U.S. catalog companies last fall, as did EchoStar Satellite Corp. (2,000 employees) and State Farm (500 employees).
- Progressive Molded Products Ltd. picked McAllen in July for a new104,000 sq. ft. plastic injection molding facility to produce automotive interior trim components. The Ontario, Canada, manufacturer plans to hire 200 employees by 2002.
- Gibbs Texas Die Casting Corp. is investing $23 million in a new aluminum and magnesium die casting facility in Harlingen and creating 204 new jobs.
- Neoplan USA, North America's largest bus manufacturer, signed an agreement to begin making buses at the Brownsville airport. The Colorado based company plans to hire 600 people within two years, including former employees of the Eagle Coach Corp., which went out of business in 1998.

- Convergys Corp., a global leader in providing outsourced customer support services to large companies, in 1999 announced plans to open a customer service center in Brownsville. The facility will create 800 jobs within two years.
- BASF Corp. is building a new facility for the manufacture of ethylene and propylene in Port Arthur. The $600 million capital investment will create 163 jobs. A major expansion project is planned at the Port of Port Arthur, a deep water facility with convenient rail and truck access. About 25 million tons (22.7 million m. tons) of cargo, primarily oil and petrochemical products, are shipped from the port annually.

This Report repeats so many of the examples printed in *Site Selection*'s September 2000 issue to make a point: All of this investment was on the heels of seven full years without the school property tax abatements. *Site Selection* magazine's other rankings for Texas during the years leading up to 2001were as follows:[488]

YEAR	NEW/EXPANDED FACILITIES (Governor's Cup)	NEW MANUFACTURING	EXECUTIVE POLL	BUSINESS CLIMATE
1986	Not in top 10[489]			
1987				
1988	9			
1989	5			
1990	2			
1991	3	Data specific to new manufacturing is unavailable prior to 1996	Data unavailable for this time period	Data unavailable for this time period
1992	1 (tie w/ NC)			
1993	2			
1994	3			
1995	2			
1996	3			
1997	3	1		3
1998	3	4	1	4
1999	6	6	2	2
2000	4	5	2	2
2001	5	8	1	1

Note that Texas was also ranked either first or second place in the executive poll category for three years prior to the passage of H.B. 1200 in 2001.[490]

[488] Archived issues of *Site Selection* magazine are available online going back to 1997. The Committee staff contacted *Site Selection* magazine to request the rankings prior to 1997. Site Selection magazine's staff provided the Committee with a spreadsheet of its Governor's Cup rankings for years 1988 to 1996, but no rankings for the other categories were provided. The spreadsheet is available in the Committee office.
[489] Data for 1986 is available online at: http://siteselection.com/sshighlites/0297/0297CHARTS/pg02.htm
[490] Note also the close correlation between the Governor's Cup ranking and the "new manufacturing" ranking.

ii. The Intel Anecdote

In addition to the erroneous *Site Selection* magazine number, one particular anecdote was discussed repeatedly in 2001 in support of H.B. 1200 about Intel.[491] During the 2001 legislative session, there was testimony that Intel changed its mind about Texas, and instead built its new billion-dollar factory somewhere else because Texas's property taxes were too high.

On November 11, 1996, the Wall Street Journal reported that Intel had decided to build its new $1.5 billion semiconductor factory at Fort Worth's Alliance Airport.[492] The article reported that the factory would employ as many as 1,500 people,[493] and that construction would begin the following year (in 1997). Production was set to start in 1999.[494] On June 11, 1997, Intel closed on the purchase of a 524-acre tract of land north of Fort Worth.[495] On July 14, 1997, Intel held a ceremonial groundbreaking for the new facility which was attended by more than 400 elected officials, business and community representatives, and education leaders.[496]

On September 4, 1997, the City of Fort Worth and Intel finalized a tax abatement agreement whereby Intel agreed to construct a new "semiconductor wafer manufacturing facility" with a minimum investment of $1 billion for the first phase, and the City of Fort Worth agreed to abate 100% of Intel's real and personal property taxes for 10 years for the first phase and any succeeding phases if construction on those phases commenced within 10 years.[497] Intel agreed to commence construction for the first phase in 1997, and substantially complete construction of the first phase within 24 months. The City's abatement was reportedly worth $117 million over 10 years.[498] Intel also received an abatement from the Northwest Independent School District worth $9 million over 10 years.[499]

---

[491] In fact, Chapter 313 became known for a time as the "Intel Bill." *See* Mark Lavergne, *Reagan adviser unveils Texas vs. California economic study*, THE LONE STAR REP., Sep. 12, 2008, p. 5; *No Cost, at Least at First*, TEX. WKLY., vol. 17, issue 36, Mar. 19, 2001. *See also Hearing on H.B. 1200 before the H. Comm. On Ways and Means*, 77th Leg. (March 14, 2001) (testimony of Kenneth Barr, Mayor of Fort Worth, expressing his support of H.B. 1200 and stating that the bill was needed because Intel left Forth Worth in part because of high property taxes).

[492] *Intel Plans to Build a Plant For Semiconductors in Texas*, WALL ST. J., Nov. 11, 1996. The Wall Street Journal also reported in the same article that Intel "just finished a $1.8 billion expansion of its Rio Rancho, N.M., factory; a $1.3 billion expansion of its Chandler, Ariz., plant; a $500 million expansion in Santa Clara; and a $600 million expansion in Hillsboro, Ore. In addition, Intel is expected to build a $300 million chip-assembly factory, which takes finished chips and puts them into packages, in Costa Rica. Production is set to start there in 1998."

[493] *See id*. Some sources say Intel was planning to hire as many as 5,000 people. *See e.g.*, D'Ann M. Petersen & Michelle Burchfiel, *Silicon Prairie: How High-Tech is Redefining Texas' Economy*, SW. ECON., FED. RES. BANK OF DALLAS, May/June 1997, p. 3.

[494] *Intel Plans to Build a Plant For Semiconductors in Texas*, WALL ST. J., Nov.11, 1996.

[495] *See* copy of deed conveying land to Intel, available in the Committee office.

[496] Max B. Baker, *Councilman to boycott Intel groundbreaking*, FORT WORTH STAR-TELEGRAM, July 13, 1997.

[497] *See* Tax Abatement Agreement Between the City of Fort Worth and Intel Corporation, available in the Committee office. Intel executed its part in July 1997, but the City did not fully execute its part until early September. Note that both of their signatures occurred after the 1997 legislative session was over.

[498] *See* Bryon Okada, *Denton to consider Intel tax breaks; Incentives would be worth $25 million over 18 years, county commissioners say*, FORT WORTH STAR-TELEGRAM, Apr. 1, 1997 (discussing the value of the City of Fort Worth's tax incentives offered). This number appears to have been calculated by tripling the City of Fort Worth's

Just over one month later, on October 24, 1997, CNET magazine reported that Intel was *delaying* opening its semiconductor plant in Fort Worth by one year.[500] CNET reported that this decision was made because Intel probably would not need the Fort Worth plant. Intel was also working on a new plant in Kiryat Gat, Israel, that was due to open in 1999. The Kiryat Gat plant was originally designed to produce only flash memory chips, but Intel began struggling in the flash memory market. Intel subsequently decided to make both flash memory chips and microprocessors at the Kiryat Gat plant. The Fort Worth plant was also supposed to make microprocessors. CNET reported that the decision to delay the Fort Worth opening potentially hinted at trouble in its microprocessor operations, and that this announcement could signal larger problems for Intel.[501] CNET noted that Intel's earnings had been disappointing and that Intel blamed its weaker-than-expected September quarter results on disappointing flash sales. CNET stated that some analysts had suggested that disappointing microprocessor demand might have played more of a role than the company was letting on. Perhaps most importantly, CNET also reported:

> Reacting to the [Intel/Fort Worth] news, as well as to more-general turmoil in Asian markets, the **Philadelphia Stock Exchange, a semiconductor index, declined 17.44 points, or 5.2 percent. The Nasdaq index, heavily weighted with tech issues, fell 20.33 points, or 1.2 percent.**

Financial markets do not take dramatic dips because companies like Intel decide to build a factory in one state versus another. Intel's contemporaneous explanations, as memorialized in news articles[502] and Fort Worth City Council Meeting minutes[503] are consistent with industry conditions being the reason for the change of plans, not Texas's tax structure.

---

own estimated value of the tax abatement for first phase, which was $39 million, since Intel stated it would build the factory in three phases. *See* Mayor and Council Communication, City of Fort Worth, Texas, Document No. C-15968, Mar. 25, 1997, p. 2, available in the Committee office.

[499] Richard Bruner, *Intel Breaks Ground On $1.3B Texas Fab*, ELECTRONIC NEWS, July 21, 1997; *see also* Jay Root & Carlos Sanchez, *Tax cuts for Intel survive in House*, FORT WORTH STAR-TELEGRAM, Apr. 24, 1997.

[500] *Intel plant delay may signal trouble*, CNET, Oct. 24, 1997.

[501] *Id.*

[502] For example, on March 27, 1998, the Fort Worth Star-Telegram reported that Intel officials had stated that the delay in the plant construction would allow the company, reeling from lower-than-expected sales and sagging profits, to reconfigure the plant to produce the new-generation 300-millimeter silicon wafers as opposed to the 200-millimeter silicon wafers that were then the standard. The Fort Worth Star-Telegram reported that Intel officials also said, "Intel is committed to Fort Worth" and "the same reasons we selected Fort Worth a year and a half ago still hold today." Jack Z. Smith, *Tax deal for Intel under fire; Fort Worth council divided over delay of chip plant*, FORT WORTH STAR-TELEGRAM, Mar. 27, 1998. *See also* Jack Z. Smith, *Council likely to extend Intel deadline*, FORT-WORTH STAR TELEGRAM, May 6, 1998.

[503] On April 22, 1998, the Economic Development Committee of the Fort Worth City Council discussed a formal request made by Intel's Forth Worth plant manager, Bruce Sohn, to amend the tax abatement agreement to change the construction timeline for the project from 24 to 60 months. Mr. Sohn explained that Intel plans to restart construction of the facility in the year 2000, and that plans call for the operation to manufacture a completely different technology not yet developed. He further stated that the company had been moving toward meeting all commitments made in the tax abatement agreement, with 10% of the construction already complete. He concluded with the fact that Intel was committed to Fort Worth and that Fort Worth would get the project. *See Highlights of*

Intel officially stopped construction in Fort Worth in 2000, after already having invested $65 million in the new facility.[504]

In 2001, Intel's manager of government affairs stated: "The [Texas] property tax rules put a severe strain on businesses that have a high amount of property investment . . . We are in a globally competitive market, and the rate we pay in Texas is just too steep in relation to the other states where we are growing and expanding."[505] But in 2008, Intel contradicted this statement when a spokesman for Intel, stated: "We determined that we didn't need that [Fort Worth] factory so we decided not to proceed with it."[506]

In 2014, Intel did precisely the same thing to Chandler, Arizona that it had done to Fort Worth in 1997-2000.[507] It promised to build a multi-billion dollar plant; it received millions of dollars in tax breaks to do so; it broke ground and invested millions on the project; and then an industry slump caused it to "delay" its plans and leave behind a half-built facility.

Chapter 313 has been in place for over 15 years now, and Intel has not built any semiconductor plants in Texas.

iii. High Franchise Tax (under old tax)

Texas's high franchise taxes on capital-intensive industries was another reason offered for passing H.B. 1200 back in 2001. With respect to the franchise tax as it existed in 2001, the Federal Reserve Board of Dallas stated:

> [T]he franchise tax doesn't reflect the modern Texas economy. The tax's wealth-based nature imposes a relatively high burden on capital-intensive industries like manufacturing and mining but a relatively low burden on labor-intensive industries, such as construction and services. Perhaps a justification could be made for this tax scheme in the early 20th century, when manufacturing and oil and gas constituted a substantial portion of Texas' economy. But in 2007, service-sector businesses made up two-thirds of the state economy, creating a situation in which similarly sized businesses had very different tax liabilities,

---

the Wednesday, April 22, 1998 Economic Development Committee Meeting. On May 19, 1998, the City Council unanimously approved Intel's requested amendment, extending the timeline for completion of the project. *See* City Council Minutes, Fort Worth, Texas, May 19, 1998, p. 19. These two documents are available in the Committee office.

[504] *See* Sandra Baker, *Trammell Crow completes deal to buy Intel property in far north Fort Worth*, FORT WORTH STAR-TELEGRAM, Jan. 8, 2014, *and* Robert Cadwallader, *New Arlington chamber CEO played role in Fort Worth Intel deal*, FORT WORTH STAR-TELEGRAM, Jan. 13, 2016. According to the Austin Chronicle, around that time Intel had also stopped 20 other office projects around the globe, and suspended work on manufacturing plants under way in Colorado, Massachusetts, and Ireland. Amy Smith, *Deconstructing Downtown*, THE AUSTIN CHRON., Apr. 20, 2001.

[505] Ginny Deal, *Texas Tempts Business with New Tax Legislation*, SITE SELECTION MAG., Nov. 2001.

[506] Bill Hethcock, *Hillwood takes Intel to court*, DALLAS BUS. J., Apr. 13, 2008.

[507] Dara Kerr, *Intel puts new Arizona chip factory on back burner*, CNET, Jan. 14, 2014.

> depending on what they produced and how they produced it . . . Do franchise taxes fall disproportionately on certain sectors of the Texas economy? The data say yes.[508] Mining faces the highest franchise tax burden at $2,083 per employee, followed by utilities, transportation and information at $1,073 and manufacturing at $574. Construction, trade and "other services" (including professional and business services) pay between $97 and $308 per employee.[509]

The revised franchise tax was passed in 2006 and went into effect in 2008. The revised franchise tax reduced the tax burden on manufacturing industries to some degree. It did this by spreading the burden out among service industries, which were becoming a larger and larger percentage of Texas's gross state product.[510] After the revised franchise tax went into effect, the burden of the business tax was spread more evenly among Texas's diverse industries.[511]

The fact that the burden of the current franchise tax is now spread more equally among the various industries undermines the argument that it justifies special benefits for manufacturing industries.

iv. High Property Taxes

Texas's high property taxes on capital-intensive industries was another reason offered for passing H.B. 1200 in 2001. This reality unfortunately has not changed since 2001. In Texas, homeowners pay ad valorem taxes to local taxing jurisdictions based upon the value of the land and the improvements to the land. Businesses, on the other hand, pay ad valorem taxes to local taxing jurisdictions based upon the value of the land, improvements to the land, and tangible personal property on the land (e.g., vehicles, desks, chairs, machinery, tools, equipment), including inventory being stored on the land for ultimate sale to customers.

According to the State Business Tax Climate Index, published by the Tax Foundation, Texas is now ranked 14th for the year 2017.[512] The Tax Foundation evaluates which states' tax systems are the most hospitable to business and economic growth. The taxes considered to create the State Business Tax Climate Index are weighted in the following order: personal income tax, sales tax, corporate income tax, property tax, and unemployment taxes. Texas's 14th

---

[508] See Chart 3, next page.
[509] Jason L. Saving, *Will New Business Tax Dull Texas' Competitive Edge?*, SW. ECON., FED. RES. BANK OF DALLAS, Mar./Apr. 2008, p. 4.
[510] The revised franchise tax did this by capturing partnerships, professional associations, and business trusts, which were some of the organizational forms taken by many legal, accounting, and medical practices. *See* TEX. TAX CODE § 171.0002(a) (defining "taxable entity" as a partnership, corporation, banking corporation, savings and loan association, limited liability company, business trust, professional association, business association, joint venture, joint stock company, holding company, or other legal entity).
[511] *See generally*, TEX. COMPTROLLER OF PUB. ACCOUNTS, THE BUS. TAX ADVISORY COMM. REP. TO THE 81ST TEX. LEG., Jan. 2009.
[512] *See* Jared Walczak et al., *2017 State Business Tax Climate Index*, TAX FOUND., Sep. 28, 2016.

place ranking is a continuation of Texas's downward trend. In 2015 and 2016, Texas was ranked 13th. In 2014, Texas was ranked 12th. In 2011, 2012 and 2013, Texas was ranked 9th.

The Tax Foundation had this to say about Texas's ranking:[513]

> The rate of the Texas gross receipts tax, called the Margin Tax, fell from 0.95 to 0.75 percent in 2016. This improvement affected the State's raw score on the corporate tax component, but did not result in an improvement in component rank. Texas fell slightly overall due to a relative decline on property tax rank.

Texas's rankings in all of the business taxation categories for 2017 are as follows:

	Overall Rank	Corporate Tax Rank	Individual Income Tax Rank	Sales Tax Rank	Unemployment Insurance Tax Rank	Property Tax Rank
Texas	**14**	49	6	37	12	37

Although Texas's overall ranking is not impressive, Texas's property tax and corporate tax rankings are abysmal. Texas's sales tax ranking is also abysmal, but it is worth noting that manufacturers, including wind farms— *i.e.*, those that are also eligible for Chapter 313 agreements— are largely shielded from the sales tax burden due to the manufacturing exemption contained in Texas Tax Code § 151.318, sometimes called the "manufacturing exemption." The manufacturing exemption is expansive and exempts manufacturers from paying sales tax on virtually all tangible personal property that is purchased, leased, used, or consumed by a manufacturer in connection with the manufacturing of its products. This includes all equipment used to manufacture the products, and the raw materials that will be used to manufacture the products. For wind energy manufactures, this includes their turbines, towers, and blades, as well as their computers used to control their equipment.

Currently, Texas businesses pay approximately 62.6% of all state and local taxes.[514]

---

[513] *Id*.

[514] *See Total state and local business taxes: State-by-state estimates for fiscal year 2014*, ERNST & YOUNG, Oct. 2015, p. 13 (indicating that out of $112.9 billion collected in total state and local taxes, businesses paid $70.7 billion). The 2015 Ernst & Young report also found that, although 62.6% of all Texas taxes are paid by business, compared to 45% nationwide (making Texas 39.2% higher than average), the taxes collected from businesses as a percent of gross state product (GSP) in Texas is only 4.9% compared to 4.6% nationwide (making Texas only 5.5% higher than average). This suggests that while Texas collects a larger-than average share of its taxes from business, its overall level of business taxes is near average.

III. House Bill 26

During the 84th Legislative Session, the Legislature took positive steps toward more extensive and meaningful analyses of economic development programs with the passage of House Bill 26.[515] H.B. 26 did two major things:[516]

1. Abolished the Emerging Technology Fund[517] and replaced it with the Governor's University Research Initiative; and
2. Created the Economic Incentive Oversight Board.

Governor's University Research Initiative (GURI)

The Governor's University Research Initiative (GURI) was created to help recruit Nobel Laureates and National Academy members to Texas public universities. The Legislature believes that having more Nobel Laureates and National Academy members at Texas universities will have a tangible impact on the Texas economy by bringing new commercialization activity to the State. The Legislature earmarked up to $400 million to the GURI fund. The bill requires the Governor's office to award matching grants out of the fund to assist Texas universities in recruiting Nobel Prize laureates and other "best in their field" researchers. Governor Greg Abbott believes that the initiative will "fuel future growth for generations to come."

Applications to the grant program are accepted on a rolling basis, and eligible institutions can apply for matching grants of up to $5 million per distinguished researcher. Grant funds will be used for recruitment costs, including the purchase of research equipment and construction or renovation of facilities necessary to support the distinguished researchers.

The inaugural round of GURI recipients received a combined total $34,292,550. Texas A&M topped the list with roughly $20 million in grants to bring five innovators to the campus in September. The University of Houston brought in three top energy researchers funded by

[515] TEX. ED. CODE § 62.161. Three bills passed during the 84th Legislative Session which created a Governor's University Research Initiative: H.B. 26, H.B. 7, and S.B. 632. House Bill 26 and S.B. 632 are identical in all relevant parts, and were signed into law first and last respectively. House Bill 7 is different than the other two bills in a number of ways and was signed into law second. The Code Construction Act provides that when amendments to the same statute are enacted in the same session without reference to each other, the statutes must be harmonized if possible. *See* TEX GOV. CODE § 311.025(b). If the statutes are irreconcilable, the latest in date of enactment prevails. *Id*. For purposes of this Report, we will treat H.B. 26/S.B. 632 as the prevailing law since S.B. 632 was signed into law last and the two bills were identical, but the Legislature may consider correcting this issue during the 85th legislative session to avoid confusion and possible litigation.

[516] House Bill 26 also renamed the "Major Events Trust Fund" as the "Major Events Reimbursement Program," but this section of the bill made no substantive changes. It merely effected the renaming. TEX. REV. CIV. STAT. art. 5190.14 (2016).

[517] The Texas Emerging Technology Fund (ETF) was a technology investment fund created by legislation in 2005 at the urging of Governor Rick Perry to promote high tech start-ups. The enabling legislation launched the ETF with $200 million. Legislative revisions during the 2007 and 2009 sessions expanded the total funds under management to approximately $500 million. More than $440 million of the money was allocated during the life of the fund to companies and universities. A 2011 report by the State Auditor found that the program lacked transparency and that the State had not properly tracked its performance.

approximately $8.5 million, and the University of Texas at Austin recruited two scholars in the fields of chemical engineering and molecular biosciences with roughly $5 million.

The ten researchers are members of various prestigious organizations including the Royal Society of the United Kingdom, the National Institutes of Health, the National Academy of Engineering, and the National Academy of Sciences.

Economic Incentive Oversight Board

The newly formed Economic Incentive Oversight Board ("Board") will be comprised by nine members: three Governor appointments, two Lieutenant Governor appointments, two Speaker appointments, and two Comptroller appointments.[518] The Board's job will be to:

1. Examine the effectiveness and efficiency of programs and funds administered by the Office of the Governor, the Comptroller, or the Department of Agriculture that award to business entities and other persons state monetary or tax incentives for which the Governor, Comptroller, or Department has discretion in determining whether or not to award the incentives; and
2. Develop a performance matrix that clearly establishes the economic performance indicators, measures, and metrics that will guide the Board's evaluations of those programs and funds.

The bill requires the Board to develop a schedule for the periodic review of certain economic development incentive programs for the purposes of making recommendations on whether to continue each program or whether to improve the program's effectiveness and efficiency. The bill also requires the Board to review and make recommendations to the Legislature regarding each program or fund according to the review schedule. The bill authorizes the Board, after conducting a review of the state incentive program or fund, to recommend to the Legislative Audit Committee that an audit of the program or fund be included in the State Auditor's audit plan. The bill requires the Board, not later than January 1 of each year, beginning with the report due on January 1, 2017, to submit to the Lieutenant Governor, the Speaker of the House of Representatives, and each standing committee of the Senate and House of Representatives with primary jurisdiction over economic development a report containing findings and recommendations resulting from each review of state incentive programs and funds conducted by the Board during the preceding calendar year.

Note that H.B. 26 "requires an examination of programs and funds that award "*state* monetary or tax incentives. . . ."[519] "Monetary incentive" is defined in the bill as "a grant, loan, or other form of monetary incentive paid from *state revenues*. . . ."[520] "Tax incentive" is defined

[518] TEX. GOV. CODE § 490G. As of the publication of this Report, the Governor, Lieutenant Governor, and the Comptroller had made their appointments to the Economic Development Incentive Board.
[519] TEX. GOV. CODE § 490G.005(a) (emphasis added).
[520] TEX. GOV. CODE § 490G.001(2) (emphasis added).

in the bill as "any exemption, deduction, credit, exclusion, waiver, rebate, discount, deferral, or other abatement or reduction of *state tax liability*. . . ."[521]

Based upon the language contained in these provisions, it is fairly clear that the Board is not obligated to examine Chapter 313 appraisal limitations.[522] Chapter 313 appraisal limitations would likely qualify as "tax incentives," but the tax incentives are awarded by local taxing units— i.e., school districts. The incentives therefore reduce *local* tax liabilities, not a state tax liability. It is unclear whether the language included in H.B. 26 was meant to exclude Chapter 313 agreements or whether this was the result of an oversight. In light of the size of Chapter 313 tax incentives, however, the Legislature may consider expanding the Board's duties to include an examination of local monetary and tax incentives, or at the very least, Chapter 313 appraisal limitations offered by school districts.

IV. Conclusion

The economic incentives debate is never-ending. The issues studied during this interim pursuant to this interim charge are eerily reminiscent of the issues studied during the 74th legislative interim by the Senate Committee on Economic Development exactly 20 years ago.[523] The interim charge back then was almost the same, and all of the arguments made both for and against economic development incentives are still being made now—almost verbatim. The only thing that has changed is that the dollar amounts at issue have gotten higher and the breadth of the programs has gotten wider both in Texas and in other states. This makes the work of the new Economic Incentive Oversight Board that much more important.

V. Recommendations

1. The Legislature may wish to reconsider its methodologies for creating and maintaining economic development incentives.

Additionally, or in the alternative, the Legislature may wish to consider:

2. Amending Chapter 313 so that school districts cannot waive the minimum jobs requirement. Otherwise the legislative purposes and intent of creating high-paying jobs is not met pursuant to Texas Tax Code § 313.004 and § 313.003.

3. Eliminating projects from eligibility for Chapter 313 unless the depreciation of such projects is limited by statute, thereby preserving the taxable value of the project upon

[521] TEX. GOV. CODE § 490G.001(3) (emphasis added).
[522] For that matter, the Board is also not obligated to examine any other local government tax incentives, including abatements, grants, exemptions, etc.
[523] S. COMM. ON ECON. DEV., INTERIM REP. ON ECON. DEV. INCENTIVES [to the] 75 THE LEG. (July 1996); *available at*: http://www.lrl.state.tx.us/scanned/interim/74/ec74.pdf.

the expiration of the appraisal limitation term. Otherwise, the legislative intent of providing a net benefit to the State over the long term pursuant to Texas Tax Code § 313.004 and the legislative purpose of expanding and enlarging the ad valorem tax base of this State are not met pursuant to Texas Tax Code § 313.03.

4. Amending Chapter 313 in the following ways: Implementing broad-based property tax reform, in the form of reduced rollback rates and reduced or eliminated taxability of business personal property and business inventory while simultaneously (a) reducing the number of years an appraisal limitation can be in effect under Chapter 313; and (b) increasing the minimum limitations amounts set forth in Texas Tax Code § 313.027.

5. Strengthening the accountability requirements of Chapter 313 agreements by eliminating self-reporting by recipients and instead requiring independent audits.

6. Amending Tex. Gov. Code § 490G to require that programs and funds administered by local taxing units that award to business entities and other persons local monetary or tax incentives are evaluated by the Economic Incentive Oversight Board for their effectiveness, efficiency, and overall effect on state finances, just like state funds and incentives.

Charge No. 4

Expedited Permitting: *Evaluate the permitting process in Texas and neighboring states and make recommendations for eliminating unnecessary barriers and expediting the process to ensure that the regulatory process is consistent and predictable.*

I. Overview of Federal Laws Affecting Texas Permitting Requirements

There are at least six major federal pollution control acts that affect Texas's environmental permitting programs, all of which are administered by the federal Environmental Protection Agency (EPA).[524] Each federal act sets minimum national standards for permitting, but allows the EPA to delegate authority to the states to create, administer, and enforce their own permitting programs based upon their own unique circumstances and needs. It would be impossible to discuss in detail every federal act which controls Texas's permitting programs, and it would also be impossible to discuss in detail every type of permit that Texas issues pursuant to these permitting programs. This section of the Report will highlight the most important federal acts for Texas permitting purposes and also some of the most common permits that Texas issues pursuant to those federal acts.

A. Federal Clean Air Act (CAA)

The Clean Air Act (CAA) is a federal law designed to control air pollution.[525] It is one of the United States' first modern environmental laws, and one of the most comprehensive air quality laws in the world.

Under the authority granted by the CAA, the EPA regulates air pollution in essentially two ways: (1) setting limits on the quantity of air pollutants that can be present in the air at a given time anywhere in the United States and (2) setting limits on the air pollutants being emitted from individual stationary sources, such as chemical process plants, petroleum refineries, primary copper smelters, and kraft pulp mills.[526] These areas of regulation are interrelated because one of the ways that the EPA limits the quantity of pollutants present in the air is by limiting the quantity of pollutants being emitted from stationary sources.[527]

---

[524] They are: Clean Air Act (CAA); Clean Water Act (CWA); Safe Drinking Water Act (SDWA); Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and Atomic Energy Act of 1954.

[525] The federal Clean Air Act (CAA) was passed in 1963, but the regulatory controls for air pollution were passed with the major amendments to the CAA in 1970, 1977, and 1990. The CAA is codified at 42 U.S.C. §§ 7401 *et seq*.

[526] The Environmental Protection Agency (EPA) also sets limits on the air pollutants being emitted from mobile sources, such as cars, trucks, buses, trains, and barges, however, mobile source emissions will not be discussed here because they do not involve permitting at the state level.

[527] *See* 42 U.S.C. § 7411; *see generally*, 42 U.S.C. Part A. *See also* 40 C.F.R. §§ 51.166 & 52.21; *and* ENVTL. PROTECTION AGENCY, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, PUB. NO. EPA-456/K-07-001, Apr. 2007, p. 3, *available at* https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf.

1. Limits on the quantity of air pollutants that can be found in the air at a given time anywhere in the United States:

The EPA sets limits on six specific air pollutants that can be found in the air at a given time anywhere in the United States, and those are: particulate matter (PM), ozone, lead, carbon monoxide (CO), sulfur oxides (including sulfur dioxide (SO_2)), and nitrogen dioxide (NO_2) (also called "NO_x"[528]). These six pollutants are called "criteria pollutants" and are subject to the federal National Ambient Air Quality Standards (NAAQS) issued by the EPA.[529] If any geographical area within a state is found to have air that exceeds the allowable limits for one or more of these six criteria pollutants (*i.e.*, the air does not meet federal NAAQS), then that area is designated "non-attainment" with respect to the pollutants that exceeded the NAAQS.[530] The EPA enforces NAAQS in non-attainment areas in several ways, one of which is by requiring the state to develop a plan for reducing the criteria pollutants in the affected areas in its State Implementation Plan (SIP).

A SIP is essentially a compilation of the laws, regulations, programs, and policies that the state will use, not only to clean up non-attainment areas and bring them back down to allowable limits, but also to comply with the CAA generally.[531] SIPs for reducing air pollution require EPA approval. If a plan does not meet the necessary requirements, then the EPA can issue sanctions against the state and, if necessary, take over enforcement of the CAA within that state.[532]

2. Limits on emissions from specific stationary sources:

There are no specific limits contained in the CAA for the number of air pollutants that can be emitted from any stationary sources. Air emissions from stationary sources are

---

[528] *See* ENVTL. PROTECTION AGENCY TECHNICAL BULL., NITROGEN OXIDES, WHY AND HOW THEY ARE CONTROLLED, PUB. NO. EPA 456/F-99-006R, Nov. 1999, p. 10 (stating that NO_x represents a family of seven compounds and that EPA regulates only nitrogen dioxide (NO_2) as a surrogate for this family of compounds because it is the most prevalent form of NO_x in the atmosphere that is generated by human activities).

[529] 40 C.F.R. Part 50. All other pollutants that are regulated by the Clean Air Act are called "non-criteria pollutants."

[530] Air pollutants are measured by a complex system of monitoring and modelling. *See generally* TEX. COMM'N ON ENVTL. QUALITY, AIR QUALITY MODELING GUIDELINES, PUB. NO. APDG 6232V2, Apr. 2015, pp. 11-13. Presently, Texas has several counties in non-attainment and those are as follows:

Ozone:*	Bexar, Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Ellis, Fort Bend, Galveston, Harris, Hood, Johnson, Kaufman, Liberty, Montgomery, Parker, Rockwall, Tarrant, Waller, and Wise Counties
Lead:	Collin (Frisco area only)
PM_{10}:	El Paso
CO:	El Paso

*2015 eight-hour standard of .070 parts per million (also referred to as 70 parts per billion)

[531] 42 U.S.C. § 7410. A state must involve the public and industries in the development of its SIP through hearings and opportunities to comment on the plan. 42 U.S.C. § 7410(a)(1).

[532] ENVTL. PROTECTION AGENCY, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, PUB. NO. EPA-456/K-07-001, Apr. 2007, p. 3.

nevertheless limited in a number of ways. One way is by permit condition;[533] another way is by Texas Administrative Code standards, which are created and codified by rule based upon emissions controls previously achieved by similarly situated sources.

The EPA requires two general categories of permits for stationary sources: a pre-construction permit and an operating permit. Collectively, these permits dictate numerous aspects of the construction and operation of stationary sources, including what exactly may be constructed and operated, how the source may be operated, emission limits, monitoring, testing, recordkeeping and reporting requirements, and compliance schedules.

a. *Pre-construction permit*

Before any construction work can begin on a new facility[534] that will emit any contaminants into the air whatsoever (including the six criteria pollutants), the party undertaking the construction must go through the "New Source Review" (NSR) process, and obtain what is sometimes called an NSR permit.[535] As part of this process, based upon its complexity and the amount of contaminants (i.e., emissions) the new source has the potential to emit into the air, the new source will be categorized and permitted as either:

- *De minimis*: Examples include laundromats (excluding dry cleaning), fireplaces, barbecues, gardening/ composting/mulching activities for personal use; and barbers, taxidermists, and auto detailing shops.[536]
- Permit by Rule: (PBR) Examples include combustion units that are designed and used exclusively for comfort heating, equipment used for the dyeing or stripping of textiles, livestock auction facilities, domestic animal shelters, zoos, soil stabilization facilities, sand and gravel production facilities, silos used to store hot mix asphalt or asphalt emulsion concrete mixtures, facilities where animals are slaughtered and prepared for human consumption, and ethyl alcohol (ethanol) production facilities.[537]

[533] For example, a permit may require the use of specific control technologies, or there may be actual emissions limits on specific pollutants itemized in the permit. Additionally, there may be emission offsets required in non-attainment areas.

[534] "New" includes modifications to existing facilities, where the modifications will cause (i) a change in method of control of emissions; (ii) a change in character of emissions; or (iii) an increase in actual or allowable emissions. 30 TEX. ADMIN. CODE §116.116(b). Although the term "facility" was used here, the more precise word is "source." The EPA defines "source" as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." 40 C.F.R. §§ 51.166 & 52.21. Thus, the thing causing emissions can be a piece of machinery or equipment, or it can be from an area, sometimes called a source point, within a facility, such as dirt pits. For purposes of simplicity in this discussion, from this point forward only the words "new" and "source" will be used unless a distinction is needed for clarity.

[535] 42 U.S.C. §§ 7401-7431; 40 C.F.R. § 51.307; 30 TEX. ADMIN. CODE Subchapter B.

[536] *See* 30 TEX. ADMIN. CODE § 116.119.

[537] *See* 30 TEX. ADMIN. CODE § 106.4.

▪ Standard Permit:	Examples include anhydrous ammonia storage and distribution operations; animal carcass incinerators, boilers with a heat input of greater than 40 MMBtu, concrete batch plants with enhanced controls, cotton gin facilities and cotton burr tub grinders, dry bulk fertilizer handling operations, and grain elevator/ grain handling operations and portable grain augers.[538]
▪ Minor New Source: case-by-case	As far as the State of Texas is concerned, a minor new source is any source that has the potential to emit regulated pollutants below the thresholds of a "major" source (see below), but that also does not qualify for *de minimis*, PBR, or standard permit thresholds. As far as the EPA is concerned, a minor new source is *any* source that has the potential to emit regulated pollutants below the thresholds of a "major" source.[539]
▪ Major New Source case-by-case (attainment):	In attainment areas, major new sources are "named" sources—*i.e.*, those explicitly listed in 40 C.F.R. § 51.166(b)(1)—with the potential to emit 100 tons per year (tpy) or more of a regulated pollutant (which can be criteria or non-criteria pollutants). Major new sources are also "un-named" sources—*i.e.*, any sources *other than* those listed in 40 C.F.R. § 51.166(b)(1)—that have the potential to emit 250 tons per year (tpy) of a regulated pollutant (which can be criteria or non-criteria pollutants). Examples include: Power plants (electric generating units), chemical process plants, petroleum refineries, primary copper smelters, and kraft pulp mills.[540]
▪ Major New Source case-by-case (non-attainment):	In non-attainment areas, major new sources are the same "named" and "un-named" sources as in attainment areas, except that the tons per year (tpy) thresholds are between 10 tpy and 100 tpy

[538] *See* 30 TEX. ADMIN. CODE Subchapter F.
[539] *See* 40 C.F.R. § 49.153.
[540] The NSR permit program for major sources has two categories: one for attainment areas and one for non-attainment areas. Confusingly, permits for sources located in attainment areas are sometimes called Prevention of Significant Deterioration (PSD) permits, whereas permits for sources located in non-attainment areas are called simply non-attainment NSR permits. A major difference in the two categories is that the control technology requirements are more stringent in non-attainment areas and called the Lowest Achievable Emission Rate (LAER). *See generally* 42 U.S.C. Subpart 2. LAER does not take the cost of the control technologies into consideration. On the other hand, in attainment, or PSD areas, a source must apply Best Available Control Technology (BACT). Regulations allows the consideration of cost in weighing BACT options. *See generally* 42 U.S.C. Subpart i. Also, in keeping with the goal of progress toward attaining the national ambient air quality standards, sources in non-attainment areas must always provide or purchase "offsets"—decreases in emissions which compensate for the increases from the new source or modification. In attainment areas, PSD sources typically do not need to obtain offsets, but there are exceptions.

depending on the level of the area's non-attainment status—*e.g.*, marginal, moderate, serious, severe, and extreme.

De minimis sources and most PBR sources are permitted by operation of law—*i.e.*, the owners/operators do not need to apply for or receive actual permits if the new source qualifies as one of these based upon its meeting of all of the criteria of the authorization. This is because the potential to emit contaminants in significant volumes from these sources is relatively low. Some PBR sources, all standard permits, and all case-by-case minor and major new sources are required to apply for and receive actual permits. Minor and major new sources will be subject to a more detailed and intensive "case-by-case" technical review before receiving authorization to begin construction. The case-by-case analysis takes into account conditions of the location, control technologies that will be used, and many other operational details for the proposed new source.[541]

The public participation requirements vary based upon these NSR categories.[542] Public participation requirements do not apply to *de minimis* sources, since no permit is required for these, or to PBR sources.[543] Public participation requirements also do not apply to most standard permit sources.[544] Public participation requirements apply to all minor and major NSR permit sources. A more detailed explanation of what "public participation" means is contained in Section III of this Charge. However, at a basic level, public participation can include receiving notice, an opportunity to comment, the option to request a public meeting, and the option to request a contested case hearing. If a type of permit is described in this Report as being subject to public participation requirements, then this means that the public is afforded at least some of these options, but not necessarily all of them.

Although the State of Texas has been delegated authority to develop its own NSR permitting program tailored to its air quality needs, the EPA retains the right to comment on NSR permits that require public participation. The EPA cannot, however, technically review, dispute, or challenge the permit's terms.[545]

---

[541] As discussed above, all new sources, no matter how big or small, are subject to the EPA-mandated NSR process. Confusingly, however, only minor and major new sources are typically referred to as needing an "NSR permit." This is probably because (most) new sources that qualify for the lower levels of permits are not required to go through much of a process other than filling out an application. They either qualify for the lower level or they do not. There is no case-by-case analysis.

[542] Public participation also includes public notice.

[543] Although the public may not participate in individual NSR permits for *de minimis* and PBR sources, the public may participate by commenting when the agency proposes rules allowing for such permits in the first place.

[544] The exceptions are concrete batch plants (CBPs), animal carcass incinerators, and permanent rock and concrete crushers.

[545] An exception to this general rule exists where the state agency action is not based on a reasoned analysis. In *Alaska Dep't of Environ. Conserv. v. EPA*, the Supreme Court sided with the EPA when, under the purported authority of the Clean Air Act, the EPA challenged an NSR permit issued by Alaska's environmental regulatory agency to a facility in an attainment area. Although an Alaska regulatory agency determined the facility's use of

For the past five years, the TCEQ has completed on average each year: 43 major NSR permits, 1,632 minor NSR permits, 1,322 standard permits, and 5,967 PBRs for a total average of 8,964 NSR air permits per year.[546]

b. *Operating permits*

After obtaining an NSR pre-construction permit, some stationary sources must also obtain a Title V operating permit, also called a federal operating permit (FOP).[547] Title V operating permits are required for some minor and all major NSR sources. A Title V operating permit is designed to ensure ongoing compliance by a stationary source by specifying what the source must do to control air pollution. Among other things, Title V operating permits:

- List emissions limits;
- List specific air pollution control requirements;
- List monitoring, testing, and record keeping requirements showing whether the source is complying with its permitted emissions limits or other pollution control requirements;
- Require regular reports on how the source is meeting its emission control requirements;
- Require the source to certify each year whether or not it has met the air pollution requirements outlined in the FOP;
- Make the terms of the FOP permit federally enforceable.[548]

Title V operating permits are subject to public participation requirements in the form of notice, opportunity to comment, and a public meeting, but they are not subject to contested case

---

"Low NO_x" met the Clean Air Act's requirement that the facility use "best available control technology," the EPA disagreed that "Low NO_x" was the best available control technology, and found that the state agency had not conducted the proper cost-benefit review for the use of a different technology, which the EPA thought was the best. The EPA therefore sought to bar the construction of the polluting facility in Alaska. The Court held that the EPA acted reasonably in rejecting the state agency's claim because the state agency had failed to make a reasonable argument in support of its ruling. 540 U.S. 461 (2004).

[546] The Texas Clean Air Act (TCAA) was passed by the Texas Legislature in 1967. The TCAA empowered the Texas Air Control Board, one of the predecessor agencies of the TCEQ, to develop and adopt ambient air standards for particulate matter (PM). The impetus for the standards was the results from field sampling surveys conducted in several regions of the State that suggested that PM control was necessary. The standards were developed in 1967, and Texas began its air permitting program on September 1, 1971. Federal ambient air quality standards were not developed until between 1971 and 1976, and the EPA did not begin an air permitting program until 1977. By then, the State of Texas had already been requiring air quality permits for six years.

[547] Operating permits are called Title V permits because they are required by Title V of the Clean Air Act. The 1990 Federal Clean Air Act Amendments required states to implement a FOP program. The EPA promulgated these requirements in Title 40 Code of Federal Regulations, Part 70. The TCEQ met these Federal requirements and provided a road map in Title 30 of the Texas Administrative Code, Chapter 122, to implement the FOP program in Texas. The EPA has approved of the TCEQ FOP program and continues to maintain oversight of the program.

[548] This means that both the EPA and the TCEQ can enforce the terms and conditions of the FOP.

hearings.[549] A more detailed explanation of what public participation means is included in Section III of this Charge.

Although the EPA has authorized the State of Texas to administer the Title V FOP program, the EPA retains substantially more oversight of these permits compared to the NSR program. In particular, the EPA has the right to review the permit application and submit any changes to the standard Title V conditions that it sees fit, including rejecting it. The EPA can also review monitoring or other reports required by the permit and review public petitions. Other states that might be affected by the permit may file public petitions asking the EPA to object to a state-issued permit.

For the past five years, TCEQ has completed an average of 617 Title V FOPs each year. The chart below summarizes the key differences between NSR permits and FOPs:

New Source Review (NSR) permit	**Title V federal operating permit (FOP)**
▪ Needed prior to construction	▪ Needed post-construction
▪ Covers a piece of equipment, or individual facilities within site; site may have multiple (or even hundreds of) NSR permits	▪ Covers the entire site
▪ Required for all new sources of air contaminants	▪ Required for major sources and certain non-major sources as specified by EPA
▪ Authorizes emissions to begin	▪ Codifies enforceable emissions limits via permit
▪ Public participation with option for contested case hearings for some NSR permits	▪ Public participation for all permits but no option for contested case hearing
▪ EPA can only comment on NSR permits.	▪ EPA can reject or modify permits, including upon request by other states.

B. Safe Drinking Water Act (SDWA)

The Safe Drinking Water Act (SDWA) is a federal law enacted to set safe drinking water standards on a national level.[550] Under the authority granted by the SDWA, the EPA sets standards for drinking water quality that apply to every public water system in the United States.

[549] For Title V operating permits, the public receives a notice of the draft permit, but it does not receive notice of the application for the permit like it does for many NSR permits. After the notice of the draft permit is issued, the public may comment for 30 days. The Executive Director of the TCEQ then has 60 days to respond to comments. More details regarding public notices and public comment periods are contained in Section III of this Charge.
[550] The Safe Drinking Water Act (SDWA) is codified at 42 U.S.C. §§ 300f *et seq.*

One of the many ways in which the EPA regulates water quality under the SDWA is by regulating underground injection wells. Underground injection wells are basically tubes that pump hazardous and non-hazardous liquid wastes into the ground into areas or formations that will contain it. Underground injection wells are used by a number of industries, including petroleum refineries, organic and inorganic chemical and pharmaceutical producers, fertilizer plants, meat processors, and uranium mines. If constructed or maintained improperly, these wells have the potential to leak and contaminate underground sources of drinking water (USDW).[551] The EPA ensures proper construction and maintenance of these wells through the Underground Injection Control (UIC) program promulgated under the Safe Drinking Water Act (SDWA).[552]

Pursuant to the Underground Injection Control (UIC) program, injection wells are categorized and permitted generally according to their potential to pollute and the danger posed by such pollution. Accordingly, injection wells are categorized and permitted according to the type of waste the wells inject and the depth the waste is injected. Based upon these considerations, wells are divided into five classes. The classes are as follows:

- Class I: Inject hazardous (I-H) and non-hazardous industrial or municipal wastes (I-NH) into zones far below underground sources of drinking water (USDW); judged by EPA to present a great potential for endangerment of USDWs, and therefore receive the UIC program's highest level of regulatory attention; these wells are very technologically sophisticated.
- Class II: Inject fluids associated with oil and natural gas production (such as brines and liquid hydrocarbons) into various zones beneath the base of USDWs either to assist with the recovery of the oil and gas, or for storage, or for disposal.
- Class III: Inject steam, water, or other fluids into mineral formations beneath USDWs to dissolve non-oil and gas minerals—such as salt, sulfur, uranium, and copper—which fluids are then pumped to the surface and the minerals extracted; generally, the fluid is treated and re-injected into the same formation.
- Class IV: These exist in two forms: legal and illegal. The illegal wells inject hazardous or radioactive wastes into or above USDWs; these wells are banned under the UIC program

[551] A USDW is defined as an aquifer or a portion thereof that supplies or could supply a public water system, contains fewer than 10,000 mg/l total dissolved solids, and which is not an exempted aquifer. Federal rules allow EPA to approve UIC program revisions to exempt portions of aquifers from protections of the Safe Drinking Water Act's UIC program if certain criteria are met. *See* 40 C.F.R. § 146.4; 30 TEX. ADMIN. CODE § 331.13(a).

[552] *See* 42 U.S.C. Part C; 40 C.F.R. Part 144. There are other federal statutes that affect UIC wells in some cases. For example, for wells disposing of hazardous waste, the Resource Conservation and Recovery Act (RCRA) has responsibility for hazardous waste issues above ground related to the well (such as treatment, storage, and processing facilities). The UIC program within the SDWA regulates everything down-hole, *i.e.*, downstream of the wellhead. RCRA is discussed in the next section.

because they directly threaten the quality of USDWs. The legal Class IV wells are those permitted pursuant to special state/federal programs for remediating the contamination that results from the illegal wells.

- Class V: Use injection practices not included in the other classes; some Class V wells are technologically advanced wastewater disposal systems used by industry, but most are "low-tech" holes in the ground; generally, they are shallow and depend on gravity to drain or inject liquid waste into the ground above or into USDWs; their simple construction provides little or no protection against possible ground water contamination, so it is important to control what goes into them.
- Aquifer Exemptions: This is not a type of well, but rather, an add-on permit that could be required for Class I, II, III, and V wells listed above. An aquifer exemption may be sought in order to exempt from SDWA protections a portion of an aquifer affected by the injection operations if the aquifer does not currently and will not in the future serve as a source of drinking water for human consumption.

Class I wells injecting hazardous waste (I-H) have a complex permitting process. The application requires operators to demonstrate that wastes will remain in the injection zone for as long as they remain hazardous. The area of review radius for Class I-H wells is at least two miles. The permitting process can take two years or more.

Class I wells injecting non-hazardous waste (I-NH) pose a lower risk than I-H wells. Therefore, the permit process and requirements are less complex. For I-NH wells, the minimum area of review radius is .25 miles. The permit review period is shorter and may be complete within a year. Permits for Class I-H and Class I-NH are issued for a maximum of 10 years.

Class II wells are specific to the oil and gas industry and are permitted by the Texas Railroad Commission. Because of the nature of the injectate and the economic incentive for the operator to keep wells in good order, the EPA assigns Class II wells a lesser level of regulatory attention.[553] In some cases, multi-well area permits are allowed, meaning multiple wells (sometimes up to several hundred wells at a time) are authorized under one permit with one fee. The permit process takes two to four months. Class II permits are valid for the life of the well.

Class III wells are similar to Class II wells except that they are for waste fluids from mining minerals other than oil and gas. Although these fluids can be toxic, the possible negative effects from many Class III projects are temporary. Further, because the operator has a strong economic incentive to maintain its wells, the regulations are also not as stringent as those for

[553] The economic incentive referenced here is the fact that the owners'/operators' valuable product is contained inside of their wells. They do not want to lose it due to well leaks or failures.

Class I wells. The area of review radius for Class III wells ranges from .25 to 2.5 miles. As with Class II wells, in some cases, a multi-well area permit may be granted. The permit review process for Class III wells lasts for between six and twelve months. Class III permits are valid for the life of the well.

Class IV wells, as discussed above, are illegal except for some aquifer remediation projects using a "pump and treat" system. This system withdraws contaminated water from an aquifer, treats it to remove the hazardous constituents, and then re-injects it. This type of beneficial injection is not prohibited if the injection takes place at an EPA-approved Resources Conservation and Recovery Act (RCRA) or Superfund remediation site and the water is returned to the same formation from which it was withdrawn.[554]

Class V wells are in most cases permitted by rule similar to stationary source air PBRs.[555] The well owner or operator must submit basic inventory information to the TCEQ and ensure that the Class V injection well is constructed, operated, and closed in a manner that protects USDWs. The TCEQ may ask for additional information or require a permit in order to ensure that USDWs are adequately protected.

Class I and III new permits, renewals, and major amendments and aquifer exemptions are subject to public participation requirements. Class IV wells are not subject to public participation requirements under the UIC program, but such wells may be subject to public participation if they are being used for an authorized remediation of groundwater under a different program.[556] Class V wells that are permitted by rule are not subject to public participation, but the remaining Class V wells are. A more detailed explanation of what public participation means is contained in Section III of this Charge.

Although Texas has primacy to administer the UIC program, the EPA conducts an annual review of the program and receives certain types of permit notices. Additionally, any rule changes and aquifer exemptions are provided to the EPA as program revisions.

---

[554] The Resources Conservation and Recovery Act (RCRA) is discussed next section. A "Superfund" is a federal program designed to fund the cleanup of sites contaminated with hazardous substances and pollutants. The Superfund program was established by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CLERCA authorizes the EPA, states, and Native American tribes to recover natural resource damages caused by hazardous substances. Many states, including the State of Texas, have their own versions of CERCLA, and use their versions more often. The Legislature created the Texas Superfund program in 1985 when the Legislature passed amendments to the Solid Waste Disposal Act. To be placed on the EPA's National Priorities List, a site must have a Hazard Ranking System (HRS) score of 28.5 or greater. To be placed on the Texas Superfund Registry, a site must have an HRS score of only 5.

[555] 40 C.F.R. Part 144.

[556] For example, a Class IV well that is part of a remediation project at a state Superfund site is subject to notice requirements and public participation as required by the Texas Safe Drinking Water Act, 30 TEX. ADMIN. CODE Chapter 361, Subchapter F, or as part of a Resources Conservation and Recovery Act (RCRA) permitted Corrective Action under a Compliance Plan in accordance with 30 TEX. ADMIN. CODE Chapter 39, Subchapter I. Details about these programs are beyond the scope of this Report.

For the past five years, the TCEQ has completed an average of 112 permits each year under the UIC program.[557]

C. Resource Conservation and Recovery Act (RCRA)[558]

The Resource Conservation and Recovery Act **(**RCRA) is a federal law enacted to set standards for the above-ground disposal of solid waste.[559] The regulated community under RCRA is comprised of a large and diverse group that includes industrial and hazardous waste generators, municipal governments, small businesses, and gas stations with underground petroleum tanks.

Subtitle C of the RCRA regulations focuses on hazardous waste.[560] Hazardous wastes are specifically defined in federal regulations, and can be liquids, solids, containerized gases, sludges, discarded commercial products, or the by-products of manufacturing processes.[561] Federal regulations set criteria for hazardous waste disposal facilities and for generators, transporters, treatment, and storage facilities. In other words, hazardous waste is regulated from the moment it is generated to its final disposal (often referred to as "cradle-to-grave" control). This includes permitting requirements, enforcement, and corrective action and/or cleanup requirements.[562]

Subtitle D of the RCRA regulations focuses on non-hazardous waste.[563] There are two primary categories of non-hazardous waste—municipal solid waste and industrial solid waste. Federal regulations ban the open dumping of municipal solid waste and set minimum criteria for the operation of municipal waste landfills, including design criteria, location restrictions, technical standards, financial assurance, corrective action (cleanup), and closure requirements.[564] Generally, state regulations control the disposal of non-hazardous industrial waste.[565] Non-

---

[557] Modern injection well permitting in Texas began in the 1960s for industries other than oil and gas (for which permitting began in the 1920s) when the Legislature passed the Injection Well Act (IWA) of 1961. At that point, chemical and steel industry companies had begun deep well injection of chemical and petrochemical process wastes. By 1961, approximately six industrial waste disposal wells had been drilled nationwide and placed in operation. The IWA authorized the newly-formed Texas Board of Water Engineers to regulate waste disposal (other than from the oil and gas industry) into the subsurface through injection wells. The Board developed well standards and Texas began its injection well permitting program that same year in 1961.[557] Texas was the first state to adopt standards for injection wells. Other states followed thereafter. Congress passed the Safe Drinking Water Act in 1974, but it did not begin an injection well regulation and permitting program until 1980. By then, the State of Texas had been regulating injection wells in some form or fashion for over 50 years.

[558] Most people pronounce this acronym "rick-ruh."

[559] In general, solid waste is disposed of above-ground, or in-ground in excavations of less than 50 feet. This depth is above groundwater tables.

[560] *See* 40 C.F.R. Parts 260 through 273.

[561] *See* 40 C.F.R. Part 261.

[562] 42 U.S.C. Chapter 82, Subchapter III.

[563] *See* 40 C.F.R. Parts 239 through 259.

[564] *See* 40 C.F.R. Parts 239 through 258.

[565] The exception being coal ash, which is a byproduct of the burning of coal for power. Ash is the most prevalent of Coal Combustion Residuals (CCRs), taking the form of fly ash (fine, smaller particles collected in air emission controls such as electrostatic precipitators) or bottom ash (coarse, larger particles that settle at the bottom of boilers).

hazardous industrial waste is sometimes disposed of in specially permitted cells within municipal waste landfills, but other times it is disposed of in industrial waste landfills, or onsite by the generator of the waste in specially permitted units.

Texas manages most waste under RCRA using two main permitting programs: Municipal Solid Waste (MSW) permits and Industrial and Hazardous Waste (IHW) permits.

i. Municipal Solid Waste (MSW) Permits

Municipal solid waste is defined as solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities. It includes garbage, rubbish, ashes, street cleanings, dead animals, medical waste, and all other solid waste other than industrial waste.[566] It also includes electronic waste from municipal, commercial, and institutional sources, including X-ray and other radiation-producing equipment. The Municipal Solid Waste (MSW) permitting program permits two main types of facilities: landfills and processing facilities.

Landfills

Type I. These are standard landfills for the disposal of municipal solid waste. Approximately 50% of Texas landfills are Type I.[567]

Type IV. These landfills only accept brush, construction and demolition (C&D) waste, and other similar waste that will not putrefy. Approximately 11% of Texas landfills are Type IV.[568]

Arid-exempt (AE). These are Type I and Type IV landfills that are in relatively dry parts of the State. These landfills are limited in the amount of solid waste they may accept and are exempt from liner and groundwater monitoring requirements. Approximately 36% of Texas landfills are AE facilities. (These are sometimes referred to as Type IAE and Type IVAE facilities).[569]

Depending on the coal type, the amount of ash that remains is 10%–30% of the coal that is burned as fuel. The EPA has established comprehensive regulations for the disposal of CCRs from coal-fired power plants under RCRA, subtitle D.

[566] *See* 30 TEX. ADMIN. CODE § 330.3. Note that the Texas definition of MSW refers to the source, rather than the constituents or properties of the waste. Thus, retailers, repair services, and the general public are municipal waste generators, whereas manufacturers are industrial solid waste generators.

[567] 30 TEX. ADMIN. CODE § 330.5.

[568] *Id*. Type II and Type III landfills existed prior to the year 2006. When the landfill rules were revamped in 2006, these two categories were no longer necessary, and were therefore eliminated after 2006.

[569] *Id*. A fourth category exists called Monofills. Counties or municipalities with fewer than 12,000 people can obtain a permit by rule to dispose of demolition waste from properties with nuisance or abandoned buildings into disposal facilities that are owned or controlled by the county or municipality. Approximately 2.5% of Texas landfills are Monofills. 30 TEX. ADMIN. CODE § 330.7(i).

Processing Facilities

> **Type V.** These facilities store or process municipal solid waste. Processing includes transfer, incineration, shredding, grinding, baling, composting, salvaging, separation, dewatering, or reclamation of municipal solid waste. Most Type V facilities are authorized by permit. Some Type V facilities qualify for authorization by registration if they meet specific requirements identified by statute and rule.[570]
>
> **Type IX.** These facilities recover energy, material, or gas for beneficial use, including landfill mining, within or adjacent to a closed landfill, an inactive portion of a landfill, or an active landfill.[571]

ii. Industrial & Hazardous Waste (IHW) Permits

Industrial solid waste is solid waste resulting from or incidental to any process of industry, manufacturing, mining, or agricultural operations. Industrial solid waste is classified as either hazardous or non-hazardous.

Non-hazardous **industrial waste:**

> **Class 1:** These are wastes that, at higher concentrations, might otherwise be categorized as hazardous due to their constituents and properties. These wastes are considered potentially threatening to human health and the environment if not properly managed. Some examples are water contaminated with ethylene glycol, asbestos, polychlorinated biphenyl above 50 parts per million in concentration, some oil-containing wastes, and solid sodium hydroxide.[572]
>
> **Class 2:** These are all wastes that are not described as Hazardous, Class 1, or Class 3. Examples are depleted aerosol cans, non-surgical and non-radioactive medical waste, and food waste and packaging that result from plant production, manufacturing, or laboratory operations.[573]

---

[570] For example, a transfer station that includes a material recovery operation, which recovers at least 10% by weight of the incoming waste stream for reuse or recycling, would qualify for an authorization by registration.
[571] Type VI, VII, and VIII processing facilities also exist but are much less prevalent than Type V and IX processing facilities. Type VI processing facilities are those that are utilizing new or unproven technologies to process municipal solid waste. Type VII facilities are those that manage sludges, such as waste water treatment residuals. Type VIII facilities handle scrap tires. *See* 30 TEX. ADMIN. CODE § 330.5.
[572] 30 TEX. ADMIN. CODE § 335.505.
[573] 30 TEX. ADMIN. CODE § 335.506.

Class 3: Wastes that are insoluble, do not react with other materials, do not decompose, and which pose no threat to human health or the environment. Examples are rocks, bricks, glass, dirt, and some plastics.[574]

***Hazardous* Industrial Waste:**

Characteristic wastes: Materials that are known or tested to exhibit one or more of the following four hazardous characteristics: ignitability, reactivity, corrosivity, and toxicity.[575]

Listed wastes: Materials specifically listed by regulatory authorities as hazardous wastes. Examples include cyanides, acetone, arsenic, chloroform, mercury, benzene, lead, and wastes produced from specific sources or processes, such as the production of pesticides.[576]

If a facility generates non-hazardous industrial waste, and the generator wants to store, treat, or dispose of the waste on-site, then no permit is required.[577] If the generator wants to store, treat, or dispose of the waste off-site from where it was produced, then the industrial waste must go to an industrial permitted facility.[578]

If a facility generates hazardous industrial waste, then the waste must be disposed of at a hazardous waste permitted facility off-site,[579] or be managed on-site in an authorized unit for hazardous waste. Units can be storage or processing tanks, container storage areas, incinerators, surface impoundments, landfills, and other types of units.[580] Petroleum refineries and chemical manufacturing plants often seek permits for hazardous waste disposal units on-site.

All new landfills require a permit, and almost all municipal waste processing facilities require a permit, except those processing facilities that may be authorized by registration.

---

[574] 30 TEX. ADMIN. CODE § 335.507.
[575] 40 C.F.R. Part 261.
[576] 40 C.F.R. Part 261.
[577] A non-hazardous industrial waste generator may dispose of its hazardous waste off-site without a permit if the site is within 50 miles of the generation site, and the off-site facility is owned or operated by the generator. 30 TEX. ADMIN. CODE § 335.2(d)(1).
[578] 30 TEX. ADMIN. CODE § 335.2(a). Most municipal solid waste facilities may accept Class 2 and Class 3 non-hazardous industrial solid waste. Only municipal solid waste facilities with dedicated Class 1 cells, which have more protective design requirements, may accept Class 1 non-hazardous waste. This is because Class 2 and Class 3 non-hazardous industrial wastes are considered less harmful to the environment and human health than Class 1 waste.
[579] Generally, hazardous waste may not be disposed of at municipal solid waste landfills. 30 TEX. ADMIN. CODE § 330.15(e)(7). An exception exists where the municipal solid waste landfill is specifically authorized by permit to accept hazardous waste from conditionally exempt small quantity generators. Conditionally exempt small quantity generators are those that generate less than 1 kg of acutely hazardous waste per month, and less than 100 kg of hazardous waste per month. If a generator meets these requirements, then it will be exempt from RCRA, Subtitle C, and a municipal solid waste facility, if permitted to do so, may accept waste from these exempt generators. *See* 30 TEX. ADMIN. CODE. § 335.2(a); *see also* 40 C.F.R. § 261.5.
[580] 30 TEX. ADMIN. CODE Chapter 335, Subchapter B.

Municipal solid waste registration applications are similar to air PBRs, except that they are often much more substantial than air PBRs and can require review of multiple binders worth of material.[581]

All new permit applications for municipal solid waste landfills, municipal solid waste processing facilities, and industrial and hazardous waste facilities are subject to public participation requirements. Additionally, permit amendments, modifications, renewals, etc. for the same are subject to public participation requirements.

Although the EPA has authorized the TCEQ to issue hazardous waste permits, the EPA receives draft permits for review. The EPA also conducts annual audits of a limited number of permits and tracks permitting progress associated with any remediation grants provided.[582] For non-hazardous waste, the EPA receives notice of the TCEQ's substantive changes to the permitting program, and it must approve any changes, but it does not review draft permits or audit permits.

For the past five years, the TCEQ has completed an average of 171 municipal solid waste permits and 119 industrial and hazardous waste permits each year.[583]

II. Texas's Environmental Permitting Process and Public Participation

As demonstrated above, the TCEQ issues a wide variety of permits to hundreds of thousands of people and entities in the State of Texas pursuant to a number of federal and state statutes and regulations. As also explained in previous sections, some of those permits have full public participation requirements, some have limited public participation requirements, and some have no public participation requirements. The following discussion outlines the permit application process for permits that have full or limited public participation requirements.

A. Administrative Review

When the TCEQ receives a permit application, its staff begins the process of reviewing the application for administrative completeness. Generally, to be administratively complete, the application must contain the information necessary to identify the applicant, the type of facility concerned, and the activities that are the subject of the application. When all of the required information has been submitted, the application is determined to be administratively complete,

---

[581] Municipal solid waste registrations may also have some minimal public notice requirements. *See* 40 C.F.R. § 124.10; TEX. HEALTH & SAFETY CODE §§ 361.0641, 361.0665–66.

[582] For example, the State of Texas receives what is known as a RCRA Performance Partnership Grant (PPG) from the EPA through the Region 6 Office. This grant funds portions of the RCRA work done in the TCEQ.

[583] The Texas Solid Waste Disposal Act was passed by the Texas Legislature in 1969. This act authorized a full state regulatory program for solid waste, including industrial and hazardous waste. The Act set out various permitting and enforcement authorities and restricted the location, design, and operation of hazardous waste management facilities. Federal standards for hazardous waste disposal were not developed until the Resource Conservation and Recovery Act (RCRA) was passed in 1976. By then, Texas had been permitting waste disposal for over seven years.

and the agency issues a Notice of Receipt of Application and Intent to Obtain Permit, or NORI.[584]

NORI:

The information required in a NORI is set forth by statute.[585] Generally, the NORI must describe, among many other things, the location and nature of the proposed activity, the procedures by which the public may participate in the final permit decision, the agency and applicant contacts for obtaining additional information and commenting, and the public place where a copy of the application can be viewed and copied. The NORI enables the public to anticipate draft permits.

The applicant is required to publish the NORI in a newspaper within 30 days after the TCEQ declares the application administratively complete.[586] Depending on the application type, the TCEQ will also either mail the NORI to certain statutorily-prescribed landowners, or require the applicant to post signs around the property with information about the application and whom to contact for more information.[587] The NORI is required to be published at least once in the newspaper of largest circulation within each county where the facility is or will be located or, if the facility is located or will be located in a municipality, at least once in a newspaper of general circulation in the municipality. For some applications, the NORI must also be published in an alternative language.[588]

All NORIs contain specific instructions for submitting comments to TCEQ, getting on the mailing list, requesting a public meeting, and requesting a contested case hearing. Comments or requests to the TCEQ can be submitted in any of the following ways: email, traditional mail, fax, in person, or via TCEQ's website. A sample NORI is contained in Appendix A to this Report.

B. Technical Review

After an application is determined to be administratively complete, the staff begins reviewing the application to determine whether it satisfies state and federal regulatory requirements. This process is called the technical review, and it can take between two and eighteen months, depending on the type of permit. During this time period, applicants frequently conduct back-and-forth communications with TCEQ staff about the technical details of the permit. Ultimately, applicants are often required to submit additional information, such as emissions calculations and site maps, or make changes to permit applications in order to gain

[584] TEX. HEALTH & SAFETY CODE § 382.056 (air); TEX. WATER CODE § 5.552 (water quality, waste, underground injection control).
[585] *See id*.
[586] *Id*.
[587] *See* 30 TEX. ADMIN. CODE §§ 39.418, 39.604, 116.133.
[588] TEX. HEALTH & SAFETY CODE § 382.056 (air); TEX. WATER CODE § 5.552 (water quality, waste, underground injection control).

approval. Once the application meets all requirements, the executive director issues a preliminary decision, sometimes called the "draft permit," in a second notice called the Notice of Application and Preliminary Decision, or NAPD.[589]

NAPD:

The NAPD must contain the same information as the NORI and much more. It must state, among other things, where the draft permit may be reviewed and copied in a local public place (in addition to the Commission's website) and it must state a variety of detailed information concerning procedures and deadlines for public meetings, public comments, response to public comments, and contested case hearings.

The applicant is required to publish the NAPD in a newspaper 30 days after the TCEQ issues the official draft permit.[590] The notice must be published in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility, as follows:

(1) One notice must be published in the public notice section of the newspaper; and

(2) For air permits, another notice with a total size of at least six column inches, with a vertical dimension of at least three inches and a horizontal dimension of at least two column widths, or a size of at least 12 square inches, must be published in a prominent location elsewhere in the same issue of the newspaper.

The notice must contain the following information:

(A) permit application number;

(B) company name;

(C) type of facility;

(D) description of the location of the facility; and

On December 21, 2015, the EPA proposed revisions to its public notice rules for major New Source Review (NSR) and Title V permit programs of the Clean Air Act (CAA). The EPA proposed removing the mandatory requirement that the permit applicant provide the NAPD through newspaper publication and instead allow for electronic noticing ("e-notice") of these actions. E-notice methods, which are already being practiced by many agencies, would produce cost savings over newspaper publication and would enable agencies to communicate these actions to the public more quickly and efficiently. E-notice is already available to minor NSR permit actions through previous EPA guidance. As part of the e-notice requirement, the TCEQ would also need to post the draft permit on a website, which the TCEQ already does. NORIs are not required by the EPA, and therefore these notices could be also made electronically if the Legislature amended the governing statutes accordingly.

[589] TEX. WATER CODE § 5.553; 30 TEX. ADMIN. CODE § 39.419.
[590] 30 TEX. ADMIN. CODE § 39.419.

(E) a note that additional information is in the public notice section of the same issue.

The Commission also mails the NAPD to the statutorily prescribed landowners, public officials, and other persons the mailing list.[591]

As with NORIs, all NAPDs also contain instructions for submitting comments to the TCEQ, getting on the mailing list, requesting a public meeting, and requesting a contested case hearing.[592] Comments or requests to the TCEQ can be submitted in any of the following ways: email, traditional mail, fax, in person, or via TCEQ's website. A sample NAPD is contained in Appendix B to this Report.

C. Public Comment, Mailing List, and Public Meeting

Public Comment / Mailing List:

The TCEQ automatically adds persons who submit comments regarding a specific permit application to the mailing list for that application.[593] Persons on the mailing list for a specific application will automatically receive any notice that follows, the Executive Director's response to comments (discussed below in Section D), the agenda setting letters for commissioner agenda meetings (discussed below in Section E), and the Commission's final order. Any person may also request to be on two additional mailing lists:

1. The permanent mailing list for a specific applicant name and permit number;
2. The permanent mailing list for a specific county (which includes all air, water, and waste notices in that county).

For most permit applications, the public comment period begins immediately upon publication of the NORI and ends at least 30 days after the last publication date of the NAPD.[594]

Public Meeting:

The TCEQ will hold a public meeting if there is significant interest in an application, if a legislator from the area of the proposed project requests one, or if a meeting is otherwise required by regulation.[595] Public meetings enable the public to learn about the application, ask questions of the applicant and the TCEQ, and offer formal comments. During the formal comment period of the meeting, the comments are transcribed by a stenographer and audio-recorded. No decision to approve or deny a permit application is made at a public meeting. A

[591] *See* 30 TEX. ADMIN. CODE §§ 39.413, 39.419 & 39.501(d).
[592] 30 TEX. ADMIN. CODE § 55.152.
[593] *See* 30 TEX. ADMIN. CODE § 39.413; the TCEQ will also automatically add a person to the mailing list if he or she requests a public meeting or a contested case hearing regarding a specific application.
[594] Hazardous waste facility permits have a 45-day comment period post-NAPD. 30 TEX. ADMIN. CODE § 55.152.
[595] On major NSR permits for both attainment areas (*i.e.*, PSD permits) and non-attainment areas, the executive director will also hold a public meeting if an interested person requests one. 30 TEX. ADMIN. CODE § 55.154(c)(3).

public meeting must be requested during the comment period, but the meeting does not necessarily have to be held before the end of the comment period. If a public meeting is held after the close of the comment period, the comment period extends to the end of the public meeting.

D. Executive Director's Response to Comment

After the NAPD has been issued, the public has at least 30 days to comment. After the public comment period closes, the Executive Director has 60 days to consider and prepare a response to all timely, relevant and material, or significant comments.[596] During this process, the Executive Director determines whether any issues were raised that require changes to the preliminary decision or the proposed permit.[597] The response must be made available to the public and filed with the Office of the Chief Clerk at least 10 days before the Commission considers the approval of the general permit. The response addresses all timely received public comments, whether or not withdrawn. The Executive Director's response to comments and decision are then sent to persons on the mailing list, including all commenters. If the TCEQ does not receive any requests for a hearing on an application, and it meets all the applicable requirements, the Executive Director may issue the permit.

E. Permit Challenges

Generally, there are five ways to contest the issuance of a permit:

1. request for a contested case hearing;
2. request for reconsideration;
3. motion to overturn;
4. motion for rehearing; and
5. judicial review.

i. Contested Case Hearings

At this point, it is helpful to take a step back in time in order to review how the contested case hearing process has evolved into its current form over time.

Ever since the 1960s when the State of Texas first began establishing an air, waste, and water quality permitting process, affected persons have had an opportunity to request an evidentiary or contested case hearing for certain categories of permit applications. Generally speaking, the same process has governed all environmental permits since that time, whether for air quality, underground injection control, municipal solid waste, industrial and hazardous waste,

[596] The Executive Director's responses to all timely, relevant and material, or significant comments are contained in a document called simply "Response to Comment." This document is sometimes referred to by its acronym, "RTC."
[597] TEX. WATER CODE § 5.555; 30 TEX. ADMIN. CODE § 55.152.

or water quality permits, although each permit program differs in procedural detail and in its susceptibility to contested case review.

Between 1961 and 1995, contested case hearings were conducted within the relevant permitting agencies by hearings examiners employed by those agencies.[598] If a timely contested case hearing was requested, then part of each agency's process entailed a preliminary hearing held by a hearings examiner at the agency to first determine whether the requestor was an affected person.[599] During this period, however, there was no statutory definition of an "affected person."[600] Some believed that the lack of a definition led to an overly broad interpretation of the term during this period.[601]

In 1995, the Legislature transferred the contested case hearing process to the State Office of Administrative Hearings (SOAH).[602] At the same time, the Legislature created the Natural Resource Conservation Division within SOAH to conduct these hearings. By this point, almost all permitting authority had been consolidated into the Texas Natural Resources Conservation Commission (TNRCC), which was the immediate predecessor agency of the TCEQ.[603] Also that year, the Legislature adopted a specific definition of "affected person."[604] The definition imposed a three-pronged test for determining whether a requestor qualified as an "affected person" who should be granted a contested case hearing:

1. The requestor must have personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing not in common with the general public;
2. The request must be reasonable; and
3. The request must be supported by competent evidence.

---

[598] The agencies first responsible for air, water quality, and waste permitting have all changed names several times since 1961, and the specific forms of pollution controlled by each agency have also changed several times. For a more detailed timeline of the agencies and their jurisdictions.

[599] The administrative processes varied somewhat from agency to agency until the Administrative Procedure and Texas Register Act (APTRA) was enacted by the Legislature in 1975, which formalized and made uniform the administrative procedures applicable to contested case hearings. *See* Acts, 64th Leg., Reg. Sess. (Tex. 1975). The statute was amended and renamed the Administrative Procedure Act (APA) in 1993.

[600] *See, e.g.*, TEX. WATER CODE § 26.028(c) (amended 1995) (water quality permits); TEX. HEALTH & SAFETY CODE §§ 361.089(b) (amended 1995) (solid waste permits) & 382.056 (amended 1995) (air quality permits); S. COMM. ON NATURAL RES., Bill Analysis, S.B. 1546, 74th Leg., Reg. Sess. (Tx. 1995), p. 1. *See also Texas Indus. Traffic League v. R.R. Comm'n of Tex.*, 628 S.W.2d 187, 196 (Tex. App.— Austin 1982), *rev'd on other grounds*, 633 S.W.2d 821 (Tex. 1982) (noting that the Texas APA "does not specify any criterion for admitting parties to hearings before administrative tribunals").

[601] H. RES. ORG., Bill Analysis, S.B. 1546, 74th Leg., Reg. Sess. (Tex. 1995), p. 2.

[602] S.B. 12, 74th Leg., Reg. Sess. (Tex. 1995)

[603] The exceptions were Class II UIC program wells, and low level radioactive waste regulation.

[604] Act of May 28, 1995, 74th Leg., Reg. Sess., ch. 882, § 1, 1995 Tex. Gen. Laws 4380, 4381 (current version at TEX. WATER CODE § 5.115(a), *amended by* Act of May 30, 1999, 76th Leg., Reg. Sess., ch. 1350, § 1, 1999 Tex. Gen. Laws 4570).

The first prong is the definition of an "affected person." The second two prongs determined whether the affected person was entitled to a contested case hearing. The 1995 changes authorized the Commission to deny hearings for requestors that did not meet the definition of "affected person" or whose request was not reasonable and supported by competent evidence.[605] The changes also gave the Commission the authority to narrow the issues referred to SOAH and set a deadline for the completion of the SOAH process. If the applicant decided not to challenge the hearing requestor's status as an affected person, then the applicant could seek direct referral of the permit contest to SOAH in order to save time. But if the permit applicant requested direct referral, then the Commission would not be able to narrow the issues being referred to SOAH, and it would not be able to set a deadline for the SOAH process to be complete.[606]

In 1999, the Legislature made more changes to the process when it enacted House Bill 801. House Bill 801 revised the public participation process for permit applications for which there was an opportunity for contested case hearings by requiring all permit applicants to provide earlier notice of the permit application.[607] Specifically, H.B. 801 created the Notice of Receipt of Application and Intent to Obtain Permit (NORI) for all permit applications. The idea behind H.B. 801 was that the public's concerns could be heard and considered during the application review process, prior to the preparation of a draft permit, instead of later through an expensive and time consuming trial-like proceeding at SOAH.

Unfortunately, H.B. 801 also revised the three-pronged test for determining whether a person was an "affected person" who was entitled to a contested case hearing by eliminating the last two prongs of the three-pronged test implemented in 1995—*i.e.*, the reasonableness, and supported by competent evidence prongs. The only requirement left was the first prong—*i.e.*, the affected person prong—which was that the person have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing not in common with the general public. H.B. 801 added new requirements for determining if an affected person was entitled to a contested case hearing. The new requirements were that the person's request for a hearing (1) involve a disputed question of fact, (2) that was raised during the comment period, and (3) that is relevant and material to the decision on the application. This standard was an easier standard to meet and, after 1999, TCEQ denied very

[605] If the hearing request did not meet the statutory requirements according to the Commissioner, then the application would not be referred to SOAH.

[606] Even where the TCEQ does set a deadline, the deadlines are often extended by agreement of the parties, or in the interest of justice. The SOAH process is complete when the ALJ issues a Proposal for Decision (PFD).

[607] Prior to H.B. 801, water quality, solid waste, and underground injection well (UIC) permit applications were required to be noticed twice, but not air permits. 30 TEX. ADMIN. CODE Chapter 39. In addition to adding air permits, H.B. 801 added a requirement that a copy of the application be made available at a public place in the county in which the facility will be located. House Bill 801 added this same requirement for the Executive Director's preliminary decision and draft permit (*i.e.*, that it be made available at a public place in the county in which the facility will be located). House Bill 801 also required a description, including a telephone number, of the manner in which the public may contact the applicant for further information. House Bill 801 made a few other changes that are too detailed to be included in this discussion.

few persons "affected person" status and contested case hearings. This led to a situation in which many permit applicants stopped opposing the public's requests for hearings (based upon their lack of "affected person" status) and instead sought direct referral to SOAH in order to save time. Without opposition, the cases were immediately referred to SOAH. By not opposing a request for hearing, permit seekers could save about three months of time in the process.

Applicants ultimately paid for this time savings, however, because it resulted in a situation in which applicants were faced with a broader scope of hearing at SOAH, limited only by what the administrative law judge (ALJ) thought was relevant and material. This is because, although the person challenging the application was required to raise a disputed question of material fact in order to get the hearing, with a direct referral, the person was not limited to challenging only that disputed fact at the hearing. Rather, the person could basically raise all "relevant and material" issues he or she wanted to because this was the scope of hearings after direct referrals to SOAH. Further, once one person met the test and was referred to SOAH for a hearing, anyone who wanted to could show up at the preliminary hearing and seek to be made a party, if he could show his status as an affected person, without ever having commented on the application, or without ever having made his existence known before the preliminary hearing.

The Legislature did not make any more significant changes to the permitting and contested case hearing process for sixteen years.

ii. Senate Bill 709 – 84th Legislative Session

In 2015, during its 84th Regular Session, the Legislature passed Senate Bill 709, which made several long-overdue changes to the contested case hearing process for permit applications for air quality, underground injection control, municipal solid waste, industrial and hazardous waste, and water quality.[608]

a. Affected Person

First, although the statutory definition of "affected person" did not change, under the new law, *the* individual or association who requests a contested case hearing must have made a timely comment on the application to be considered an "affected person" who is eligible for a contested case hearing. Further, for issues to be eligible for a contested case hearing, *the* issues must have been raised by the affected person in a comment made by that affected person. Additionally, if a person makes a hearing request in response to the Executive Director's response to comment, the issues raised in the hearing request will not be considered timely unless the person also raised those issues during the public comment period. A group or association seeking to be considered an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

[608] Senate Bill 709 applied to all permits filed after September 1, 2015.

Thus, S.B. 709 eliminated the situation in which a person could be made a party to a contested case hearing by latching on to another person's hearing request without having commented himself. Senate Bill 709 also eliminated the situation in which a person could bring up any relevant and material issues he wanted to at the hearing—now, only those issues raised by comment may be heard in a contested case hearing, unless there is a direct referral to SOAH. Senate Bill 709 further eliminated the situation in which persons could comment for the first time and seek a contested case hearing for 30 *more* days after the Executive Director responds to public comments, which could be over 90 days after the public comment period was over.[609] The bill also eliminated situations where associations or groups could be considered affected even if no individual member of the association or group could be identified that was affected in his or her own right early in the process. Now, the person must be identified earlier. The bill therefore discourages groups from inappropriately contesting cases to further a broader agenda or for frivolous reasons.

b. House and Senate Member Notice

Second, pursuant to S.B. 709, the Executive Director now must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit (*i.e.*, 30 days prior to the issuance of the Notice of Application and Preliminary Decision (NAPD)). This requirement is new and had no corresponding predecessor requirement.

c. Commissioner Power to Limit Cases and Issues Referred

Third, assuming a person made timely comments on the application, and is an affected person, S.B. 709 identifies specific additional information that the Commission may consider when determining if the affected person is entitled to a contested case hearing, including the following:

(1) The merits of the underlying application;
(2) The likely impact on the health, safety and property use;
(3) The administrative record;
(4) The analysis and opinions of the Executive Director; and
(5) Other expert reports, affidavits, opinions or data submitted.

Upon the Commission's finding that a person or association is an affected person who is entitled to a contested case hearing, the Commission will narrow the issues for consideration and then refer those issues to SOAH for the contested case hearing. The issues referred must be detailed and complete and contain only factual issues or mixed questions of fact and law. This of

[609] The Executive Director has 60 days to respond to public comments after the public comment period is over. If the public gets 30 more days after that, then this would be 90 days. Note that even after the S.B. 709 changes, affected persons still have 30 days after the Executive Director responds to comments to seek a contested case hearing—the difference now is that those persons must have commented during the public comment period first.

course is only applicable to those situations in which the applicant does not choose to skip the Commission's "affected person" determination at preliminary hearing at the TCEQ to save time. For those cases in which the applicant chooses to skip the "affected person" determination at the agency, now, at least the person requesting the hearing will be someone who has timely commented on the application.

d. Draft Permit Constitutes Applicant's Case-in-Chief

Fourth, when the Commission files the application, draft permit, and preliminary decision, and other documentation with SOAH as the administrative record, the record, by itself, automatically establishes a *prima facie*[610] demonstration that the draft permit meets all state and federal legal and technical requirements, and that the permit, if issued, would protect human health and safety, the environment, and physical property. The *prima facie* case may be rebutted by evidence demonstrating that at least part of the draft permit violates a specifically-applicable state or federal requirement. If there is such a rebuttal, the applicant and the Executive Director may present additional evidence to support the draft permit.

Prior to S.B. 709, the contested case hearing was a *de novo* proceeding before an Administrative Law Judge (ALJ). Once a permit application was referred to SOAH, the technical review process that preceded it had to be "proved up." The applicant was required to show through engineers, experts, fact witnesses, etc. (again) that its application met all of the legal and technical requirements for issuance of the permit. In effect, the process superseded all of the work undertaken by the state agency engineers, scientists and other professionals legally charged with reviewing permit applications and required the applicant to go prove up its application in a trial-type proceeding to someone else—an ALJ at SOAH. Based on the trial-type proceeding, the ALJ then developed a record and recommendation to the commissioners. That record and the ALJ's proposal for decision then became the sole basis on which the Commission were allowed to decide the application.

Senate Bill 709 did not shift the burden of proof to the protestants as some opponents of the bill have alleged. Under current law, in a contested case hearing regarding a permit application, the permit applicant is still the moving party with the burden of proof. The new statute simply provides that, in a contested case hearing, the moving party (*i.e.*, the applicant), meets its initial burden of proof in the contested case by submitting the TCEQ's administrative record of its application to SOAH.[611] This initial proof is then subject to rebuttal by the protesting parties.[612] If, following the rebuttal, the ALJ finds the case equally balanced, the applicant will lose.

---

[610] *Prima facie* is Latin for "at first look," or "on its face." The term refers to situations in which the evidence offered is accepted as correct and sufficient until proved otherwise.
[611] TEX. GOV. CODE § 2003.047(i-1).
[612] TEX. GOV. CODE § 2003.047(i-2).

In addition, S.B. 709 did not establish any new evidentiary standard for any party in a contested case hearing, nor did it provide any direction to SOAH or the Commission to establish a new standard for the rebuttal demonstration. Because contested case hearings are similar to non-jury civil trials in district court, the evidentiary standard in contested case hearings for permit applications is still "preponderance of the evidence."

e. Executive Director Made a Party

Fifth, S.B. 709 clarified that, although the Executive Director is still required to be a party to contested case hearings to complete the administrative record and support the agency's position developed in the draft permit, he may reverse or revise his position on the draft permit.[613]

f. Time limits at SOAH

Finally, S.B. 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a contested case hearing to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the Commission. Senate Bill 709 allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For applications directly referred to SOAH due to the applicant seeking direct referral, the preliminary hearing may not be held until the executive director has issued his response to public comments.

Prior to S.B. 709, the 180-day time limit was not set by statute. Time limits could only be set by the TCEQ if the commissioners made the determination of whether a person was an "affected person" who was entitled to a contested case hearing. Now all proceedings are limited to this time, (including those directly referred) unless the time is extended by agreement or in the interests of justice.

---

[613] Prior to the 2001, the Executive Director was a mandatory party in all TCEQ contested cases at SOAH under Texas Water Code 5.228. Concerns were expressed during the 2001 sunset process that the Executive Director was too closely aligned with the applicant and assisting the applicant with its burden of proof in contested cases. Therefore, the 2001 TCEQ sunset bill amended the statute to provide for discretionary party status by the Executive Director based on rules adopted by the Commission. The rules adopted by the Agency prohibited the Executive Director from being a party on certain types of applications, required the Executive Director to be a party on certain types of applications, and provided the Executive Director discretion to determine whether to be a party on all other types of applications based on certain factors in the rules. 30 TEX. ADMIN. CODE § 80.108. Over the next decade the pendulum swung the other way as the Executive Director rarely became a party on those applications in which there was discretion. This meant that the commissioners did not have the full benefit of the Executive Director's staff's expertise in making their decisions on contested permit applications. Over time, the commissioners began directing the Executive Director to be a party on most contested permit applications. The 2011 TCEQ sunset bill amended the statute to once again make the Executive Director a mandatory party in all permit contested cases at SOAH. Senate Bill 709 clarified that the Executive Director could revise or reverse his position. TEXAS WATER CODE § 5.228(c)(2).

In essence, S.B. 709 makes it so that Texas law will presume that the Executive Director's staff has done its job correctly. But if an affected person can establish (1) that it identified alleged error in timely comments that preceded the recommendation and (2) that the error means that "one or more provisions in the draft permit violate a specifically applicable state or federal requirement," then he can be successful at a contested case hearing. By this reform, the Legislature prevents the situation that existed before, which was that the expert opinions and extensive work of the TCEQ staff were not given sufficient weight in any case sent to a contested case hearing. This reform also relieves the applicant of the obligation it had before, which was to put on evidence to prove up all showings required to obtain a permit, even those which were not directly controverted by the protesting parties with evidence. Instead, the parties will direct their evidence to whatever specified terms of the permit the opponent has evidence to contest.

A result of S.B. 709 was reducing so-called "greenmail," whereby project opponents file contested case hearing requests secure in the knowledge that the associated burdens in time and resources on applicants could delay or even kill a project, or incentivize concessions, including direct payments to secure withdrawal of the requests.[614]

Returning to the original discussion about the options for challenging permits, in addition to a contested case hearing, members of the public seeking to challenge a permit application have the following options.

iii. Request for Reconsideration / Commissioner Agenda Meetings

Request for Reconsideration

Any member of the public may file a request for reconsideration with TCEQ asking the Commissioners to reconsider the Executive Director's decision on the permit application. This includes any member of the public who is not eligible for or chooses not to request a contested case hearing. This also includes any member of the public that did or did not comment on the application. The request for reconsideration must be filed within 30 days after the TCEQ's Executive Director sends his response to comments and preliminary decision on a permit application. Note that at this point, the Commissioners have not ruled and the permit has not been issued. The Commissioners deliberate these requests at Commissioner agenda meetings.

[614] On August 7, 2015, the *Corpus Christi Caller Times* reported that Buckeye Texas Partners LLC, which specializes in the transportation, storage and marketing of liquid petroleum products, donated to the Environmental Justice Housing Fund in exchange for the Fund's parent group, Citizens for Environmental Justice, dropping a legal challenge against a permit the company was seeking to expand its operations there. The Fund is used to pay for families who live in the area to move out. It was established in 2015 after a different permit challenge was settled for more than $2 million. Matt Woolbright, CORPUS CHRISTI CALLER-TIMES, Aug. 7, 2015.

Commissioner Agenda Meetings

A permit will be set for a commissioner agenda meeting if a contested case hearing was timely requested[615] or if a request for reconsideration was timely filed (which could be after the public comment period is over, and within 30 days after the Executive Director has responded to comments and issued his preliminary decision). These meetings are formal, legal proceedings.[616] The commissioners primarily consider live presentations made during the meeting and briefs filed in advance, but the commissioners may consider all items for which proper notice was given. In making their decision, the commissioners consider public comments and requests, briefs, the executive director's response to comments, and applicable statutes and rules. Oral comments are not accepted at agenda meetings unless so specified by the commissioners, and requestors are not required to attend. However, the commissioners may ask questions of the requestors (if present), the applicant, or TCEQ personnel. The commissioners decide at the agenda meetings whether they will grant or deny the request.

iv. Motion to Overturn

If no timely hearing request or request for reconsideration is filed and the permit is issued by the Executive Director, then *any* member of the public can file a motion to overturn the Executive Director's decision with the commissioners, but only to the extent of the changes from the draft permit to the final permit decision. The motion must be filed no later than 23 days after the date that the TCEQ mailed the notice of the signed permit and must explain why the commissioners should review the executive director's action. If the commissioners have not acted on a motion to overturn within 45 days after the date that the TCEQ mailed the notice of the signed permit, then the motion is denied by operation of law, unless an extension of time has specifically been granted.

v. Motion for Rehearing

If the commissioners issue a decision that approves a permit application, then *any* member of the public may file a motion for rehearing requesting that the commissioners review their decision. This is true regardless of the procedures taken before it—*e.g.*, a request for reconsideration denied, or a permit was approved even after a contested case hearing, or a permit was approved because no one challenged it. Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commissioner agenda meeting. This motion for rehearing is a prerequisite for appealing the agency action to the District Court[617] and must be submitted within 25 days after the date the

[615] A contested case hearing request will not be set for a commissioner agenda meeting if the applicant opts to skip this process and requests direct referral to SOAH.
[616] Agenda meetings are conducted in accordance with Chapter 551 of the Texas Government Code, which codifies the Open Meetings Act.
[617] Except that if a motion to overturn was filed and denied, then the person does not also need to file a motion for rehearing. 30 TEX. ADMIN. CODE § 50.139(g).

decision was issued. If the commissioners do not act on the motion within 55 days after the date the decision was issued, or a later date approved by the commissioners, the motion is denied by operation of law. If the motion for rehearing is denied, or denied by operation of law, then the protestants can appeal the agency action in the Travis County District Court.

vi. Judicial Review

If a person has exhausted all *available* administrative remedies, then he may file a petition for judicial review with the Travis County District Court.[618]

The word "available" is emphasized because a member of the public is only obligated to exercise the administrative rights available to him. This is a key point and a point that has been the subject of misinformation. If, for example, a person sought a contested case hearing, but was denied one because he was deemed not an "affected person" by the agency, then having gone through a contested case hearing process is not a prerequisite for judicial review. He may seek judicial review (after filing a motion for rehearing) but the judicial review will be limited to the question of whether the agency properly adjudicated his status as an affected person who should have been entitled to a contested case hearing on the merits of the application. If court finds that the agency properly adjudicated this question, and the person is not an affected person, then this is the end of the road for him because only "affected persons" may challenge permits. If the court finds that the agency was wrong, and he is an affected person, then the case will be remanded back to the agency to allow him his contested case hearing on the merits of the permit application.

If on the other hand, a person did not find out about an application until after it was too late to comment, and therefore too late to seek a contested case hearing, then he need only timely file a motion for rehearing to establish his right to judicial review. In this case, the only administrative right available to him would be the motion for rehearing of the issuance of the permit. If the motion for rehearing is denied, then he may seek judicial review of the agency's decision to issue the permit on the basis of defective notice. If the court agreed, then the court would remand the application to the agency to correct the error.

Thus, in conclusion, a person may seek judicial review of the issuance of the permit even if he failed to file a timely public comment, failed to file a timely hearing request, failed to participate in the public meeting, and failed to request a contested case hearing. To do so, the person must first file a motion for rehearing or a motion to overturn the executive director's decision to the extent of the changes from the draft permit to the final permit decision.[619] If the

---

[618] *See Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (holding that when "an administrative body has exclusive jurisdiction to make the initial determination in a dispute, a party must exhaust all administrative remedies before seeking judicial review of the decision. Until the party has satisfied this exhaustion requirement, the trial court lacks subject matter jurisdiction.")

[619] *See* 30 TEX. ADMIN. CODE §§ 55.201(h) & 55.25(b)(3), adopted November 5, 1997, and effective December 1, 1997, which were derived from predecessor rules 31 TEX. ADMIN. CODE §§ 263.22 & 263.23.

motion for rehearing (or motion to overturn) is denied, then he may seek judicial review in District Court. The district court petition must be filed within 30 days of the effective date of the agency's order.

The scope and standard of judicial review in contested cases is governed by the Administrative Procedure Act (APA) and an agency's organic statutes providing for judicial review. A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the APA.[620] The scope of judicial review of a state agency decision in a contested case is as provided by the law under which review is sought.[621] None of the TCEQ judicial review statutes provide for trial *de novo* judicial review; therefore, the scope of judicial review is governed by Government Code, Section 2001.174, which provides that a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but: (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

III. Overview of the EPA's Public Participation Requirements, and Texas Compliance Therewith

The federal acts with the strictest public participation requirements to maintain state delegation or authorization of permitting programs generally list the following as minimum requirements:[622]

(1) An opportunity to inspect the information submitted by the applicant;
(2) The availability of the draft permit, and the agency's analysis and proposed approval or disapproval of the draft permit, in at least one area in the location that will be affected;
(3) A notice of the new source by prominent advertisement in the location that will be affected, and the agency's analysis;[623]

[620] TEX. GOV. CODE § 2001.171.
[621] TEX. GOV. CODE § 2001.172. Judicial review of TCEQ decisions on permit applications that are subject to contested case hearings is provided by TEX. WATER CODE § 5.351 and TEX. HEALTH § SAFETY CODE §§ 361.321(a), & 382.032.
[622] *See* 40 C.F.R. §§ 51.160–51.164, 51.166.
[623] 40 C.F.R. § 51.161.

(4) The advertisement must include information about the specific degree of increment consumed (i.e., for certain air permits, information about how the new source will move the area closer to non-attainment);
(5) An opportunity for the public to comment on the application for at least 30 days;
(6) An opportunity for public hearing for interested persons to appear and submit written or oral comments on the air quality impacts of the source, alternatives to it, the control technology required, and other appropriate considerations;[624] and
(7) An opportunity for state judicial review.[625]

As discussed above, Texas's statutes and rules provide for all of the public participation requirements listed and much more. For example, Texas rules require the added benefit of the NORI. The NORI is notice of the application itself, with detailed information about the procedures for commenting and otherwise participating in the process. By contrast, the EPA rules only require the NAPD that Texas provides. The NAPD is notice of the draft permit and agency's preliminary decision after technical review is already complete. The NORI is beneficial because it serves to put the public on notice much earlier of applications and actions that may be of interest, enabling the public to anticipate draft permits.

Not only is the NORI reasonably calculated to give the public much earlier notice than the EPA requires, but it acts to extend the public comment period significantly beyond the minimum time period required by the EPA. The EPA only requires a 30-day public comment period, which begins after the draft permit is complete. Texas's NORI requirement commences a public comment period that lasts as long as the technical review itself and beyond. As discussed above, the technical review period for some complicated permits, especially those that are subject to contested case hearings, can take up to 18 months or more to complete. When the comment period begins with the publication of the NORI (before technical review begins) and does not end until 30 days after the technical review period ends and the NAPD has been published, the resulting public comment period can exceed 18 months. The EPA has acknowledged that these provisions of the Texas public participation process go beyond the minimum requirements.[626]

Additionally, for air permits, Texas rules require physical signage at the proposed site, a "display type" newspaper notice,[627] and an alternate language newspaper notice. In most cases, the physical signage must stay up during the entire comment period—*i.e.*, from the time of the

[624] 40 C.F.R. § 51.166(q).
[625] *See*, *e.g.*, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (proposing to disapprove of Virginia's PSD SIP due to state law standing requirements limiting judicial review); 72 Fed. Reg. 72,617, 72,619 (Dec. 21, 2007) (approving South Dakota's PSD program); 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012) (approving a portion of California's PSD program).
[626] Approval and Promulgation of Implementation Plans; Texas; Public Participation for Air Quality Permit Applications, 79 Fed. Reg. 551, 553 (Jan. 26, 2014).
[627] This is the requirement that the NAPD be published in the notice section, and also elsewhere in the paper with specified minimum dimensions.

NORI to 30 days after publication of the NAPD, and even longer if a public meeting is held beyond the official comment period. By contrast, the EPA requires none of this. The EPA has acknowledged that these provisions also go beyond the EPA's minimum requirements.[628]

Further, even after the changes implemented by S.B. 709, Texas rules still allow for full, civil trial-like proceedings at SOAH by affected persons, in addition to the opportunity to comment, request a public meeting, and seek judicial review. The SOAH process that is still provided for by Texas statute is not required by the EPA. The EPA only requires a "public hearing," which is a place for interested persons (who can be anyone) to appear and submit written or oral comments. The EPA has acknowledged that Texas's public meeting process is equivalent to the EPA's "public hearing" process, because the purpose of a Texas public meeting is to take written or oral public comments.[629] Thus, Texas statutes allowing for a public meeting to satisfy the public hearing requirement and contested case hearings are simply extra.

The EPA's permitting process, which it is safe to assume satisfies the EPA's own standards, provides notice and an opportunity for the public to comment on an application, but it does not provide an opportunity for opponents to the application to request a contested case hearing. A permit decision finalized by the EPA can be appealed to the EPA's Environmental Appeals Board (EAB); however, the EAB's decision is based on written or oral arguments and does not involve an evidentiary hearing.

The EAB appeal option can be loosely analogized to Texas's motion for rehearing directed to the TCEQ commissioners, except that the TCEQ commissioners are not an independent appeals board separate from the agency, do not have to hold a hearing on the motion if they do not want to, and even if they grant a hearing, do not have to take written or oral arguments in support of or against the motion. Alternatively, the EAB appeal option can be loosely analogized to Texas's SOAH process, except without SOAH's trial-like procedures of written discovery, oral depositions, fact and expert witness testimony, and cross examination at a hearing that takes place over the course of days or weeks.

If the EPA receives no comments requesting a change in the draft permit during the public comment period, and if all of the notice requirements are met, then the final permit becomes effective immediately.[630] If the EPA did receive comments requesting a change to the draft permit, but the EPA did not change the draft permit in response, and there is no appeal (to the EAB) of the agency's decision not to change the draft permit, then the permit decision becomes effective 30 days after issuance.[631]

---

[628] Approval and Promulgation of Implementation Plans; Texas; Public Participation for Air Quality Permit Applications, 79 Fed. Reg. at 553 and 554 (see comment 6 and response 6 and comment 14 and response 14).
[629] Approval and Promulgation of Implementation Plans; Texas; Public Participation for Air Quality Permit Applications, 77 Fed. Reg. 74,129, 74,134-35 (Dec. 13, 2012).
[630] 40 C.F.R. Section 124 has notice requirements.
[631] 40 C.F.R. § 124.15(b).

If an EAB appeal is requested, then the regulations distinguish between an appeal involving an existing facility that is already operating under a permit and an appeal involving a new facility that is applying for its first permit. If the appeal involves a new facility, new injection well, new source, etc., then the permit applicant will be without a permit pending final agency action and may not proceed under the permit during the time period.[632] If the appeal involves a permit for an existing facility, the facility may continue to operate under the uncontested conditions of the old permit and under those uncontested conditions of the new permit that are severable from the contested conditions.

If the contested permit conditions are not severable from the uncontested conditions then the permit is stayed pending final agency action.[633] Upon receipt of a petition for review, the Regional Administrator will notify the EAB, the applicant, and all other interested persons of which permit conditions are uncontested and severable from any contested provisions.[634] These uncontested and severable conditions become fully effective 30 days after the date of the Regional Administrator's notification.[635] If review of the permit was denied, the permit will become effective immediately.[636] If the permit is for a new facility, the permit applicant will be without a permit pending resolution of the appeal and final agency action. Prevention of Significant Deterioration (PSD) permit decisions are treated differently under the regulations from other permit decisions that are subject to EAB review.[637] For such permits, construction of new or significantly modified facilities cannot begin until a final permit is issued by the Regional Administrator (or delegated state agency) following EAB review.[638]

The EAB review historically has taken an average of five months from the time a petition is filed to the time the EAB issues its decision in the matter; however, the EAB has issued a standing order to assist the EAB in expediting further its New Source Review (NSR) prevention of significant deterioration (PSD) appeal process.[639]

After an appeal to the EAB, or to SOAH, in Texas's case, has concluded, the process is essentially the same at the state level and the federal level. When the hearing is over, the EAB, or the administrative law judge at SOAH, prepares a recommendation called a proposal for decision (PFD) and issues it to the agency that referred the case, which then may adopt, modify, or vacate

---

[632] 40 C.F.R. § 124.16(a)(1).
[633] 40 C.F.R. § 124.16(a)(2)(i).
[634] 40 C.F.R. § 124.16(a)(2)(ii).
[635] 40 C.F.R. § 124.16(a)(2)(i).
[636] 40 C.F.R. § 124.19(l)(2)(i).
[637] 40 C.F.R. § 124.16(a).
[638] 40 C.F.R. § 124.15(b)(2).
[639] *See* Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits, Envtl. Appeals Bd., Envtl. Protection Agency (Mar, 27, 2013) *available at* https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/5142bae13e64e69885257bc5003fdbd3/$FILE/NSR%20Revised%20Standing%20Order%202013.pdf).

the PFD and issue a final decision. Final orders by the EPA or the TCEQ can then be appealed to federal or state district court.

Supporters of replacing contested case hearings with notice-and-comment hearings argue that this would increase the opportunity for public participation in permit hearings.[640] They argue that a notice-and-comment meeting is less intimidating than a contested case hearing and is a much better forum in which to air fears and complaints about a proposed facility. Most experts agree that those opposing a permit application in a contested case hearing need to hire lawyers and expert witnesses to present technical arguments effectively.[641] Most ordinary citizens do not have the resources to become involved in what is essentially a costly civil trial. Any citizen, however, can attend a public notice-and-comment meeting to ask questions and to inform the TCEQ staff of facts and arguments the agency may have missed. In most cases, the TCEQ is required to respond to those protesting a permit and explain the rationale for its decision. A public meeting allows the permit applicant, TCEQ staff, and neighbors of the proposed site to exchange ideas freely. State officials then may take public input into account when making permitting decisions.[642]

Supporters also argue that contested case hearings have been abused by people who oppose permits without a valid technical reason. Often people object to a new facility out of fears that it may, for example, affect their property values. A contested case hearing is not the proper venue for this kind of dispute and is unfair to the applicant when used in this way. A public notice and comment meeting would create a proper forum for the public to vent frustrations over facility siting decisions.[643]

Although the number of permits that end up in contested case hearings is relatively small, and may end up being even smaller after the passage of S.B. 709, the mere threat of such hearings has the tendency to chill would-be investors in Texas. This is because, even when an application is technically correct and the applicant has met or exceeded every demand asked of him by law, regulations, or agency discretion, the time and expense of a possible hearing are so great that the applicant may choose to go elsewhere with its business.

Indeed, at the Senate Natural Resources and Economic Development hearing on April 1, 2016, TCEQ's executive director, Richard Hyde, stated that while the percentage of permits that wind up in contested-case hearings is small, they often represent some of the largest projects

---

[640] The only caveat is that the public meetings may need to have fewer conditions than they do now to satisfy the EPA. Presently, the TCEQ will only hold a public meeting if there is significant interest in an application, if a legislator from the area of the proposed project requests one, or if a meeting is otherwise required by law, which is only the case in some circumstances.

[641] H. RES. ORG., Pub. Participation in Envt'l Permitting, Focus Report, Mar. 19, 1999, p. 5.

[642] *Id*.

[643] *Id*.

proposed in the State. "Big refinery projects, power plants, those kinds of things," he said. "So, the economic investment is big."

If the number of permits that end up in contested case hearings is small, then the number of permits that end up changed or denied is even smaller—two cases referred to SOAH, to be exact, resulted in the ultimate denial of a permit between 2007 and 2013. Environmental advocates acknowledge that, even when contested-case hearings are granted, they rarely result in a permit being denied.[644] This statement supports the argument that contested case hearings waste time, resources, and money, and in the vast majority of cases, they do not bring about any different result. When the contested case hearing does cause concessions on the part of the applicant—either in the form of direct cash payments to the challengers to go away, or in the form of actual permit concessions—it is not because of the wisdom of the contested case hearing process. Rather, it is because the applicants are so desperate to save the time and costs attendant to the contested case hearing that they are willing to make the cash payments demanded, or else make the permit concessions demanded, just to move things along.

Eliminating the contested case hearing process in favor of a notice-and-comment process with an EAB-style appeal option would not result in fewer options or less powerful recourse for those who truly have cause to challenge permit applications. If a public citizen has genuine cause for wanting a permit to be denied, then he should be eager to forgo the non-binding contested case hearing process in favor of appearing before a district court to prove his case before a judge, whose decision is actually binding on all parties involved. Arguably, the false sense of security provided by the non-binding contested case hearing process is not worth the corresponding deterrence its existence provides to potential new investors in Texas.

Finally, there is no evidence that states without a contested case hearing process are less effective in protecting the public and the environment against pollution hazards. Many states do not provide an opportunity for contested case hearings.

The federal government grants delegation of environmental programs to states if their programs fulfill certain federal requirements. The EPA uses the public notice-and-comment system when granting federal operating permits. If Texas were to adopt a similar notice-and-comment system, then Texas should have no problem keeping its federal delegation and authorization of environmental programs because there would be no difference in the hearing requirements between state and federal programs.

Because the EPA's federal permitting process does not include an opportunity for opponents to request a contested case hearing, the Committee believes that Texas will continue to meet the legal requirements for, and be able to continue to implement, the federally delegated

[644] Sara Sneath, *Permit process pits state officials against residents*, VICTORIA ADVOCATE, May 14, 2016.

or approved permitting programs in air, waste, and water quality even if TCEQ's contested case hearing process is changed or eliminated.

IV. Other Notable Legislative and Agency Efforts to Streamline the Permitting Process at TCEQ

A. "Expedited Permitting" program authorized by Senate Bill 1756 (83rd Legislature, 2013)

On June 14, 2013, Senate Bill 1756 was signed into law which authorized a new program allowing for the expedited processing of air permits that are required under the Federal Clean Air Act (CAA). At the time, the TCEQ had a backlog of air permit applications, which had the effect of slowing down investment in Texas and, potentially, diverting business to competitor states like Louisiana.[645] The new program allowed Texas businesses to request expedited processing of their air permits, provided that they paid a surcharge to cover the extra cost of expediting review of that permit.[646] Before S.B 1756 was passed, TCEQ had the ability to provide limited expedited processing for some permits, but it did not have the ability to impose a surcharge.[647] After rulemaking was complete, the expedited permitting program officially began on November 13, 2014.

Under the expedited permitting program, the applicant pays extra money for TCEQ examiners to work overtime to review their applications. The expedited applications are examined by examiners who work overtime for this specific purpose.[648] Since the program's inception, the TCEQ has received 569 expedited permit applications, and it has "completed"[649] 416 of those permits. It is important to note that applicants who request expedited permitting must still comply with all applicable federal and state regulatory requirements. These requirements include public participation, where applicable, which means the opportunity to submit comments, request a public meeting, and request contested case hearing. In addition, when public notice is required for an expedited project, the published notice must indicate that the application is being processed in an expedited manner.[650]

---

[645] S. COMM. ON NATURAL RES., Bill Analysis, S.B. 1756, 83rd Leg., Reg. Sess. (Tex. 2013), p. 1.
[646] TEXAS HEALTH & SAFETY CODE § 382.05155(a), (d).
[647] According to TCEQ, prior to the passage of S.B.1756, projects may have been rushed for a variety of reasons ranging from requests from the Governor's Economic Development Program to the applicant providing sound justification for the need to rush an application. There was not a statute or rule in place, and these decisions were based on management discretion.
[648] Additionally, TCEQ began a pilot program in November 2015 in which it hired two retired TCEQ permit examiners as part-time independent contractors to examine expedited permit applications.
[649] "Completed" normally means that the permit was issued, but occasionally, projects are voided, withdrawn, or denied.
[650] TEXAS HEALTH & SAFETY CODE § 382.05155(c).

For applicants who choose to participate in the expedited permitting program, the average processing time for major case-by-case NSR permits[651] has been cut by over four months (from ~446 days to ~318 days). The average processing time for minor case-by-case NSR permits[652] has also been cut by over four months (from ~348 days to ~217 days). The average processing time for standard permits that require public notice[653] has been cut by over one week (from ~84 days to ~75 days), and the average processing time for standard permits that do not require public notice has been cut by over two weeks (from ~38 days to ~20 days). Finally, the average processing time for a permits-by-rule (PBRs) has been cut by a month and a half (from ~64 days to ~21 days).

The surcharges for expedited review range from $500 for standard permits and permits-by-rule to $20,000 for the most complicated, major source permits.[654] As discussed above, the surcharges collected by applicants are used strictly to pay for the expenses incurred by the expediting, including overtime, contract labor, and other costs (*e.g.*, extra computer terminals if needed, etc.).[655] If the cost of processing an expedited application exceeds the standard surcharge amount collected, the TCEQ may assess and collect additional surcharges from the applicant to cover the additional costs of expediting the permit.[656] Likewise, the TCEQ will refund any unused portion of the surcharge.[657]

For the 2016-2017 biennium, the TCEQ was appropriated $1 million for the expedited permitting program.[658] This means that the agency is allowed to spend up to $1 million during the biennium beginning September 1, 2015, and ending August 31, 2017, on overtime, contract labor, and ancillary expenses associated with fulfilling expedited air permit requests. The $1 million in funds comes directly from the surcharges that TCEQ charges applicants for the expediting—it does not come from general revenue or other sources of revenue that support the agency's budget. In order to encourage employees to work overtime to work on expedited permit applications, the TCEQ was authorized to pay up to twice the normal hourly rate for such work.[659] The TCEQ is requesting the same appropriation for the 2018-2019 biennium, as well as

---

[651] The most complicated permit applications are generally the case-by-case NSRs for major new sources. Major NSRs are those that trigger some sort of federal permit review such as prevention of significant deterioration (PSD), non-attainment, or section 112(g). Section 112(g) is a case-by-case determination of maximum achievable control technology (MACT) requirements for hazardous air pollutants. Some minor sources also require Title V.
[652] Lesser complicated permit applications referenced here are the minor case-by-case NSRs for minor new sources.
[653] This does not include standard permits for concrete batch plants. The average processing time for concrete batch plants, for which public notice is also required, has been cut by one week (from ~103 days to ~96 days).
[654] *See* TEX. COMM. ON ENVTL. QUALITY, IMPLEMENTATION OF THE EXPEDITED PERMITTING PROGRAM, Pub. No. APDG 6258v6, rev. Sep. 2016, p. 1.
[655] TEXAS HEALTH & SAFETY CODE § 382.05155(d).
[656] 30 TEX. ADMIN. CODE § 101.601(c).
[657] Except that no amounts will be refunded for the lowest fee expedited permits—*i.e.*, the $500 expedited standard permits and PBRs. *See* TCEQ's IMPLEMENTATION OF THE EXPEDITED PERMITTING PROGRAM guidance document, p. 1; *see also* 30 TEX. ADMIN. CODE § 101.601(d) (stating that TCEQ *may* refund any unused expedited permitting fees).
[658] Appropriation Rider authorized by General Appropriations Act, Article IX, §18.57 (83rd Leg. 2013).
[659] *See id*.

authority to spend any additional fees collected as a result of recent heightened demand for expedited permitting.

Overall, the program has been a resounding success. The State has not spent any extra money, the applicants are happy, and the general public has not suffered because its notice and participation rights have not been affected.

B. Waste permitting checklist implemented by Waste Permitting Division at TCEQ

The Industrial and Hazardous Waste (I&HW) permits section of TCEQ recently unveiled a customizable electronic checklist for Industrial & Hazardous Waste storage/ processing/ disposal facility permit applicants to use when preparing major applications.[660] The checklist serves a three purposes: saving the applicant and permit examiners time and effort, reducing deficiencies, and improving the quality of permit applications. The electronic checklist comes in the form of an Excel spreadsheet that includes both the administrative and technical requirements of a permit application. By answering 17 simple questions with the click of a mouse, the applicant can customize the checklist to fit each facility's specifications. The automated screening sorts through the requirements generating one of the 133,000 possible versions of the checklist, tailored to the applicant's needs. The electronic checklist has been praised by national organizations, such as the Association of State and Territorial Solid Waste Management Officials (ASTSWMO).[661]

V. Recommendations:

1. If the EPA adopts its proposed e-notice rules for major NSR and Title V operating permits under the Clean Air Act, then the Legislature may consider adopting similar rules in order to provide time and cost savings to businesses seeking permits.

2. The Legislature may consider appropriating the requested $1 million for administration of the expedited permitting program and adopting exemption rider language that will accommodate TCEQ's hiring of more persons to work on expedited permitting applications.

3. The Legislature may consider eliminating the contested case hearing process and in its place adopting a notice-and-comment process with an EAB-style appeal option.

[660] The checklist is available at: https://www.tceq.texas.gov/permitting/waste_permits/ihw_permits/ihw.html
[661] *See Easier, Better, Faster Permitting – A New Tool from Texas*, *ASTSWMO*NEWS, Winter 2016, p. 3 (featuring a write up on the program and providing a link to the checklist).

Charge No. 5

ERCOT/PUC Electricity Issues: *Conduct legislative oversight and monitoring of agencies and programs under the committee's jurisdiction. In this oversight and monitoring, the committee should: 1) identify and recommend opportunities to streamline programs or services and enhance grid safety while maintaining the mission of ERCOT and PUC and their programs; and 2) identify barriers ERCOT or PUC may have in their governance that may be appropriate to improve or eliminate.*

The Committee took no action on this charge.

Charge No. 6

Oil Field Theft: *Study and make recommendations for solving the oil field theft problems facing Texas, including identifying the proper mechanisms for increasing enforcement effectiveness.*

I. Background

The oil and gas industry is a crucial component of the Texas economy. In 2014, it accounted for 13.5% of the State's economic output.[662] The industry pays almost $14 billion in state and local taxes every year.[663] In 2015, operators in Texas produced slightly more than 1 billion barrels of crude oil from 193,807 wells.[664]

A. The Oilfield Theft Problem

The remote location and unmanned operation of many of the State's oil wells puts their production at risk of theft. According to a witness who testified before the Committee's interim hearing on this topic, between one and three percent of the oil and condensate produced in Texas was stolen in 2013.[665] Given that 703 million barrels were produced that year,[666] the theft resulted in the loss of between $700 million and $2.1 billion to the oil's lawful owners, based on its market value during that time, as well as the loss to the State of taxes that otherwise would have been due.

According to the witnesses who testified before the Committee, criminal organizations steal oil using a broad range of methods.[667] Some use the straightforward method of stealing the oil at night in unpermitted, and therefore illegal, tanker trucks.[668] Some drive legal tanker trucks to wells they are not authorized to visit.[669] Others steal oil in water trucks or saltwater disposal trucks not authorized to carry more than the trace amounts of oil usually found in produced water.[670] After it is stolen, the oil is then usually laundered at a facially legitimate facility like

---

[662] Texas Taxpayers and Research Association (TTARA), *Miracle on Ice? What Low Oil Prices Mean for Texas* 2, Mar. 2016.
[663] Testimony of James LeBas, House Committee on Energy Resources and House Committee on Economic and Small Business Development, Apr. 28, 2016.
[664] Railroad Commission of Texas, *Crude Oil Production and Well Counts (since 1935)*, available at: http://www.rrc.texas.gov/oil-gas/research-and-statistics/production-data/historical-production-data/crude-oil-production-and-well-counts-since-1935/ (Aug. 19, 2016).
[665] Written Testimony of Robert Ream, Senate Committee on Natural Resources and Economic Development, November 6, 2015. Figures were not yet available for 2014 at the time of the hearing.
[666] Railroad Commission of Texas, *Crude Oil Production and Well Counts (since 1935)*, available at: http://www.rrc.texas.gov/oil-gas/research-and-statistics/production-data/historical-production-data/crude-oil-production-and-well-counts-since-1935/ (Aug. 19, 2016).
[667] Testimony of Robert Ream, Senate Committee on Natural Resources and Economic Development, November 6, 2015. *See also* Testimony of Mike Peters and Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[668] *See* Written Testimony of Mike Peters, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015, at 1.
[669] *Id.* at 2.
[670] Testimony of Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.

another oil well, a saltwater disposal well, or a business that cleans oil residue out of tanks.[671] As a result, oilfield theft almost always involves cooperation between multiple individuals who have formed a criminal organization to both steal and launder the stolen hydrocarbons.[672]

Once it is removed from a well site, stolen oil and condensate is difficult to trace, especially if it is commingled with lawfully-obtained hydrocarbons.[673] In other words, if a criminal organization were to use a truck to legally retrieve oil from tank batteries located at two well sites and then illegally raid a third site, the stolen oil from the third site would be impossible to identify. Law enforcement's inability to physically trace stolen hydrocarbons makes it very difficult for investigators to identify the full extent of a criminal organization without the testimony of a member of the organization.[674] The witnesses who testified before the Committee generally agreed that penalty levels in existing law made it difficult to procure this testimony through plea bargains, because prosecutors could not credibly threaten long enough prison sentences under state law to turn apprehended truck drivers against their organizations.[675] Some prosecutors presently use federal money laundering and wire fraud laws, which have more severe penalties attached,[676] but these statutes are not always applicable.

B. The 84th Legislature's Attempted Solution

During the 84th Regular Session, the Legislature attempted to respond to the problem of oilfield theft by passing House Bill 3291. The bill would have added a new Section 85.390 to Subchapter K, Chapter 85 of the Natural Resources Code.[677] Section 85.390 would have made it a second-degree felony for a person who was not a pipeline operator or gatherer authorized to operate by the Railroad Commission of Texas to possess, transport, remove, deliver, accept, purchase, sell, or physically move oil, gas, or condensate without a permit, approval, or authorization from the Commission, or a pending request on file with it.[678] The level of intent necessary to be culpable for this new offense was recklessness, which is defined by the Penal Code as follows:

---

[671] Testimony of Mike Peters and Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[672] Written Testimony of Mike Peters, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[673] *See* Testimony of Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[674] *See* Testimony of Mike Peters and Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[675] *E.g.*, Written Testimony of Mike Peters, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[676] Testimony of Robert Butler, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.
[677] H.B. 3291, 84th Leg., Reg. Sess., at 1 (Tex. 2015). Chapter 85 of the Natural Resources Code pertains to the Conservation of Oil and Gas, and Subchapter K contains provisions related to penalties, imprisonment, and confinement.
[678] *Id*.

> A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Second-degree felonies are punished in Texas by a mandatory prison sentence of between two and twenty years and an optional fine not to exceed $10,000.[679] House Bill 3291 passed the House unanimously and the Senate with only one dissenting vote.[680]

The basic goal of the bill was to criminalize a broad range of conduct that was symptomatic of oil field theft so that law enforcement could then apply the statute to specific cases where foul play was suspected. The conduct criminalized was not the actual theft of hydrocarbons, but the act of possessing or transporting them without proper administrative authorization from the Railroad Commission. In other words, the bill attached significant criminal penalties to a broad range of activities that had previously been civil infractions punishable by fines. The decision to make these new offenses second-degree felonies was based not only on the power a threatened twenty-year sentence would have in plea negotiations, but also because it would trigger asset forfeiture of the trucks and other equipment involved in the offense.[681]

C. The Governor's Veto

On June 18, 2015, Governor Abbott vetoed H.B. 3291. Although he expressed sympathy with the overall goal of the bill, he described the following concerns with its approach:

> . . . its overly broad language creates severe criminal penalties for conduct that may have nothing to do with theft of oil and gas. For example, the bill would make it a second-degree felony to possess, purchase, or sell oil or gas without the proper Railroad Commission permit. Under current law, such violation results only in a civil fine – like most other violations of state permitting rules. But under House Bill 3291, the penalty for not having the appropriate Railroad Commission paperwork could be as much as 20 years in prison. And because the crime created by the bill requires only a reckless mental state, a felony conviction could be obtained even if the defendant did not know his paperwork was out of

[679] Tex. Penal Code § 12.33 (2016).
[680] 84 H.J. Reg. 1978 (2015); 84 S.J. Reg. 1857 (2015).
[681] *See* Written Testimony of Mike Peters, Senate Committee on Natural Resources and Economic Development, Nov. 6, 2015.

> order. Turning paperwork errors into felonies is not the right solution to the very real problem of oil and gas theft.[682]

Lieutenant Governor Patrick subsequently charged the Committee with revisiting this issue in detail during the interim and recommending proper mechanisms for solving the oilfield theft problem facing the State.

II. Discussion

The Committee heard testimony and discussed the Lieutenant Governor's charge on November 6, 2015. Like the Governor, the Committee was sympathetic to the desire to discourage and effectively prosecute oilfield theft, but its members expressed concerns with the methods employed by H.B. 3291.

The core strategy of H.B. 3291 was to enable what the legal profession calls "pretextual prosecution" of oilfield crime.[683] The classic pretextual prosecution was that of Al Capone.[684] The Federal Bureau of Investigation (FBI) had extensively investigated Capone based on its suspicion that he was the head of a criminal organization guilty of a myriad of serious crimes.[685] But the FBI was unable to produce evidence sufficient to prove his guilt for those crimes beyond a reasonable doubt.[686] Instead, the federal government ultimately prosecuted him for the less serious crime of tax evasion.[687] This prosecution was pretextual because the government's motivation for prosecuting Capone was not his tax evasion; it was his suspected activities as a mobster.

While pretextual prosecutions can and do put criminals in prison, it is important to recognize that they are inherently in tension with the due process of law. They are used, by definition, to put people in prison because of suspected, uncharged conduct that could not be proved. Their role as a law enforcement tool is to make an end-run around the burden of proof to punish a person for a crime the government did not have enough evidence to prove. By design, they undermine the checks placed on government to prevent abuse of its power.

House Bill 3291 presented an additional concern: it was designed to criminalize much more conduct than its advocates wanted to punish. All oilfield thieves are missing the proper Railroad Commission paperwork, but not all people without the proper paperwork are oilfield thieves. As passed, the bill could have turned a vast number of administrative infractions that were unrelated to oilfield theft into serious felonies. As the Governor noted, this could have automatically made felons out of a large number of people who, while not adhering to the

---

[682] Proclamation by the Governor of the State of Texas, June 18, 2015.
[683] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584 (2005).
[684] *Id*.
[685] *Id.* at 583.
[686] *Id*.
[687] *Id*.

Railroad Commission's regulations, were also not oilfield thieves. Their only protection from twenty years in prison would have been prosecutorial discretion.

A hypothetical helps to illustrate this issue. It is an administrative infraction to enter the secured area of an airport with a knife. All terrorists who plan to hijack airplanes with knives commit this infraction. But a large number of other people who are not planning to hijack airplanes also commit this infraction. The equivalent of H.B. 3291's strategy would be a bill designed to fight terrorism by making it a second-degree felony to enter the secured area of an airport with a knife. If such a bill were to pass, the assurances of legislative witnesses that felony charges would only be brought against suspected terrorists would be cold comfort to the ordinary people who later violated the statute by walking through airport security carrying pocketknives.

Greater specificity in drafting can accomplish H.B. 3291's goals without its potential problems. The advocates of H.B. 3291 wanted to be able to threaten oilfield thieves with longer sentences than the value of the stolen oil would otherwise allow under Section 31.03 of the Penal Code, the general theft statute. The bill's advocates believed that these longer sentences would encourage lower-level members of oil theft organizations to testify against higher-level members. At the same time, the bill's advocates sought to attach higher penalties to the crime of laundering stolen oil than were otherwise available, both to pressure and to deter the higher levels of those criminal organizations. All of these goals can be achieved without broadly criminalizing a wide swath of administrative violations. In fact, similar enhanced penalties already exist to deter theft of identification documents, firearms, and metal.[688] To the extent Section 31.03(b)(2)'s[689] prohibition on possession of stolen property cannot be used effectively to prosecute oil launderers, the Legislature could draft a separate oil laundering statute analogous to Chapter 34's[690] money laundering provisions.

III. Recommendations

The Committee finds that oilfield theft is widespread, ongoing, and seriously damaging to the State's economy. With this in mind, the Committee recommends that the 85th Legislature:

1. Consider passing legislation to enhance penalties for oilfield theft and oil laundering to better enable district attorneys and law enforcement officers to prosecute all levels of the criminal organizations that perpetrate oilfield crime; and

2. Avoid relying on prosecutorial discretion to narrow its drafting. Any enhancements designed to fight the problem of oilfield theft should be narrowly-tailored to prohibit the specific conduct the Legislature seeks to punish.

[688] *See* Tex. Penal Code § 31.03(e) (2016).
[689] *Id*. at § 31.03(b)(2).
[690] *Id.* at §§ 34.01–34.03.

Charge No. 7

Monitoring Charge: *Monitor the implementation of legislation addressed by the Senate Committee on Natural Resources and Economic Development during the 84th Legislature, Regular Session and make recommendations for any legislation needed to improve, enhance, and/or complete implementation. Specifically, monitor the following: 1) Legislation relating to Texas aerospace incentives; 2) Expedited permitting; and 3) Electric utility rate adjustments.*

I. Legislation Relating to Texas Aerospace Incentives

Last session, the Legislature passed Senate Bill 458 which continued efforts that began back in 1987 to foster the development of the aerospace industry in Texas. In order to understand S.B. 458, it would be helpful to have an understanding of the efforts that began back in 1987.

A. Historical Context of S.B. 458

In 1987, the Legislature created the Texas Space Commission to encourage economic development of industries related to the commercialization of space.[691] In 1993, the Texas Space Commission was renamed the Texas Aerospace Commission. The Commission recruited aerospace industries to Texas, administered state grant funds to assist with the establishment of spaceports (reusable launch facilities), and helped promote space-related research.

In 1999, the Legislature passed S.B. 1092, authorizing cities and counties to create Spaceport Development Corporations to pursue the development of commercial spaceports.[692] In 2001, the Legislature appropriated $1.58 million to the Texas Aerospace Commission to provide grants to local communities to support the development of spaceports.

In 2003, the Legislature passed S.B. 275, which abolished the Texas Aerospace Commission and the Texas Department of Economic Development (both separate state agencies) and transferred their economic development functions to the newly created Texas Economic

---

[691] Prior to this, space exploration was a government-run enterprise. https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Aerospace%20Commission%20Staff%20Report%202003%2078%20Leg.pdf (See sunset docs).

[692] Development Corporations are authorized by the Development Corporation Act of 1979 ("the Act"). The Act allowed municipalities to create nonprofit development corporations that could promote the creation of new and expanded industry and manufacturing activity within the municipality and its vicinity. The development corporations operated separately from the municipalities, with boards of directors that would oversee their efforts. These corporations, in conjunction with industrial foundations and other private entities, worked to promote local business development. However, prior to 1987, these entities were dependent on funding from private sources, which was often was difficult to obtain. At that time, development corporations could not legally receive funding from the State or local governments because of a Texas constitutional prohibition against the expenditure of public funds to promote private business activity. In November 1987, the voters of Texas approved an amendment to the Texas Constitution providing that expenditures for economic development could serve a public purpose and were therefore permitted under Texas law. The Legislature then amended the Act to allow development corporations to be funded by the imposition of a local sales and use tax dedicated to economic development.

Development and Tourism Office within the Office of the Governor.[693] Senate Bill 275 required the Governor's office to establish and maintain an aerospace and aviation office, and that office was required to develop an industry-specific strategic plan, including short-term and long-term business strategies, to promote the development, retention, and expansion of aerospace and aviation industry facilities in the State. The office was to analyze the State's economic position in the aerospace and aviation industries, and make specific recommendations to the Legislature and Governor regarding the promotion of these industries.

Senate Bill 275 also created the Spaceport Trust Fund to attract commercial rocket launching facilities to the State of Texas.[694] The Spaceport Trust Fund consists of money from gifts, grants, or donations to the Office of the Governor for the development of spaceport infrastructure, and any other source of funds designated by the Legislature.[695] Further, money from the Trust Fund may only be spent on a viable business entity that has the financial, managerial, and technical expertise and capability to launch and land a reusable launch vehicle or spacecraft and has committed to locating its facilities at a spaceport in this State. Additionally, the spaceport project must demonstrate that it has secured at least 75% of the funding required for the project, and that it has obtained or applied for the appropriate permissions from the Federal Aviation Administration.[696]

In 2013, the Legislature appropriated $15 million to the Spaceport Trust Fund. On August 4, 2014, SpaceX publicly announced that it had decided on Boca Chica Beach in Brownsville, Texas, as the location for its new non-governmental launch site with construction expected to begin later in 2014. SpaceX will be the world's first commercial orbit launch site. Of the $15 million in legislatively-appropriated Spaceport Trust funds, $13 million went to SpaceX for the Boca Chica project. SpaceX received an additional $5 million from the Greater Brownsville Incentives Corporation, $4.4 million from Emerging Technology Fund, $2.3 million from the Texas Enterprise Fund,[697] $2.3 million from its Enterprise Zone Designation,[698] and $360,000 from the Texas Skills Development Fund. The SpaceX project received an additional incentive in the form of a Chapter 313 appraisal limitation for 10 years for the project from Point Isabel ISD, which began in 2015. The Chapter 313 agreement provides that, for 10 years, SpaceX will only pay school district maintenance and operations property taxes on $20 million

[693] 78th Leg., Reg. Sess. (Tex. 2003).
[694] TEX. GOV. CODE § 481.0069.
[695] TEX. GOV. CODE § 481.0069(c).
[696] TEX. GOV. CODE § 481.0069(d).
[697] SpaceX has been doing business Texas since 2003. The company has a rocket development facility in McGregor where the rockets and spacecraft undergo propulsion and structural testing and where the company has been performing test flights with its rocket prototypes. The company has 500 employees in Central and South Texas. A SpaceX representative said $70 million has been invested at the MacGregor facility, which covers 4,000 acres. Megan Gannon, *Texas Offers SpaceX $15 Million in Incentives to Build Private Spaceport*, SPACE.COM, Aug. 7, 2014; Steve Taylor, *SpaceX calls on legislators to support Texas Spaceport Trust Fund*, RIO GRANDE GUARDIAN, June 4, 2016.
[698] Written Testimony of Jason Hilts, Brownsville Econ. Dev. Council, Apr. 1, 2016, p.2.

worth of its property value rather than on its full property value. The Brownsville launch site is expected to be operational by 2018.[699]

According to the Brownsville Economic Development Council, SpaceX's Brownsville port is expected to create 500 direct jobs over the next decade, draw $85 million in capital investment to the city, and generate $51 million in annual salaries.[700] The Brownsville Economic Development Council also believes that the new spaceport could create an "ecosystem" of aeronautical and engineering firms catering to the launches. Further, the SpaceX project will be collaborating with the Center for Advanced Radio Astronomy (CARA) at the University of Texas Rio Grande Valley (UTRGV)[701] in a public-private partnership known as STARGATE.[702]

STARGATE will be a research and space exploration technology center adjacent to SpaceX's future command and control center. STARGATE will be run by the University of Texas Rio Grande Valley faculty and students. At the STARGATE center, astrophysics students will get to work in modern laboratory facilities and access SpaceX's state-of-the-art satellite equipment and its engineers. STARGATE will give students the ability to be directly involved in all aspects of a space mission, including the design of spacecraft, testing, launch, and orbital operations. In addition, STARGATE will include a business incubator for electronics and radio frequency-based technology companies. The proximity of the University of Texas Rio Grande Valley to the STARGATE research center, business incubator, and commercial spaceport is predicted to create unique opportunities for collaboration and research, and significantly boost the University's technical and educational resources. The development of STARGATE has prompted the UT System to designate Center for Advanced Radio Astronomy (CARA) the first research unit of University of Texas Rio Grande Valley.[703] The goal of STARGATE is to create a pipeline for the University of Texas Rio Grande Valley students to gain experience and later work for SpaceX.[704]

B. Senate Bill 458

The 84th Legislature passed S.B. 458 in 2015, adding muscle to the work done in 2003 to promote the aerospace and aviation industry. In particular, as part of the industry-specific strategic plan that the Governor's aerospace and aviation office is required to develop (pursuant to S.B. 275 from 2003), S.B. 458 requires the office to recommend policies: to increase

---

[699] Written testimony of Jason Hilts, President and CEO, Brownsville Economic Development Council Senate Committee on Natural Resources and Economic Development April 1, 2016.
[700] http://www.usatoday.com/story/money/business/2014/10/05/spacex-brownsville-spaceport/16584729/
[701] The University of Texas at Brownsville and The University of Texas-Pan American ceased operations last year and their assets were combined to create The University of Texas Rio Grande Valley.
[702] STARGATE stands for **S**pacecraft **T**racking and **A**stronomical **R**esearch into **G**igahertz **A**strophysical **T**ransient **E**mission.
[703] Written testimony of Jason Hilts, President and CEO, Brownsville Economic Development Council, Senate Committee on Natural Resources and Economic Development April 1, 2016.
[704] http://www.usatoday.com/story/money/business/2014/10/05/spacex-brownsville-spaceport/16584729/

investment in aerospace and aviation activities; to determine the appropriate level of funding for the Spaceport Trust Fund; to support ongoing projects that have been assisted by the Spaceport Trust Fund; to strengthen higher education programs supporting aerospace activities; and to support initiatives aimed at addressing the high technology skills and staff needed to promote the State's efforts in becoming a leader in the nation for space exploration.

Further, S.B. 458 requires the Governor's aerospace and aviation office to provide short term and long term statutory, administrative, and budget-related recommendations to the Legislature and Governor, and a plan for implementing the policy recommendations listed above by December 1, 2016. The Legislature must implement the short term recommendations by 2020 and the long term recommendations by 2025. The bill also adds ongoing reporting requirements by the aerospace and aviation office concerning the work it is doing.

Finally, S.B. 458 revised the composition and duties of the Aerospace and Aviation Advisory Committee appointed by the Governor. Previously, the Advisory Committee was to be made up of seven "qualified" members to advise the Governor on the recruitment and retention of aerospace and aviation jobs and investment. "Qualified" was not defined in the statute (and it still is not), but now the Advisory Committee will be made up of those seven qualified members, plus one member for each active spaceport development corporation in the State. Presently, there are three active spaceport development corporations in the State, and those are:

Cameron County Spaceport Development Corp

McLennan County Spaceport Development Corp

Midland Spaceport Development Corporation

C. Conclusion and Further Monitoring

SpaceX is presently under construction. The Governor has appointed members to the Advisory Committee representing all three spaceport development corporations. The remainder of the Advisory Committee members and their biographies are available on the Governor's appointments page.[705] The Senate Committee on Natural Resources and Economic Development awaits the Aerospace and Aviation Advisory Committee's report on December 1, 2016, including recommendations by the members of the Advisory Committee.

II. Expedited Permitting

In 2015, during the 84th legislative session, S.B. 709 was signed into law, which made several long-overdue changes to the current contested case hearing process for permit applications for air quality, underground injection control, municipal solid waste, industrial and

[705] Available at: http://gov.texas.gov/news/appointment/21899.

hazardous waste, and water quality.[706] In Charge No. 4, the Committee addressed these changes in detail, as well provided a historical analysis of permitting and contested case hearings as it existed prior to S.B. 709 for context. Please see Charge No. 4, Section II, "Texas's Environmental Permitting Process and Public Participation." In the interest of brevity, the analysis and history will not be repeated here.

Interim Monitoring

On April 1, 2016, the Senate Natural Resources and Economic Development Committee held a hearing in which witnesses were invited to testify on the monitoring of S.B. 709. Steve Minick on behalf of the Texas Association of Business (TAB) stated that its members are grateful for the reforms that S.B. 709 implemented, but that the reforms have not moved Texas to the top of the stack in terms of efficiency in permitting. Mr. Minick stated that TAB would continue to monitor the changes, but suggested that another area of improvement is in the initial public participation options and process. He stated that the public's options can be unclear and procedurally complicated, and that some people don't know what to expect. Clearer public participation options would be an improvement.[707]

Hector Rivero, on behalf of the Texas Chemical Council, stated in his testimony that permitting is critically important when businesses are deciding whether to locate in Texas. Mr. Rivero noted that Louisiana has a very streamlined process, and he complemented the Texas Legislature's work on S.B. 709 in order to make Texas's process more streamlined as well. He further commented that the TCEQ did a fantastic job in its rulemaking. Mr. Rivero stated that, at this time, the Texas Chemical Council would like to continue monitoring the implementation of these reforms. Tony Bennett for the Texas Association of Manufacturers (TAM) also complemented the Legislature's efforts on S.B. 709.

Richard Walsh, on behalf of Valero (which is a member of TAM and the Texas Oil and Gas Association), reminded the Committee that the TCEQ is the largest permitting agency in the world—it issues more permits than any other governmental agencies, and it issues some of the most complex permits. He complimented the work of the TCEQ, and stated that he believes that most people do not comprehend how much work the agency takes on. He said that for industry, speed in the permitting process is critical. He stated that, in this regard, Valero greatly appreciates the expedited permitting program enacted in 2013. He suggested that the Legislature examine whether the overtime incentives are enough to attract the highest quality engineers for the permits in order to get them done.

At this point, only one permit application has proceeded under the reformed public participation rules implemented by S.B. 709, and the outcome would have been the same for this

[706] Senate Bill 709 applied to all permits filed after September 1, 2015.
[707] Written Testimony of Stephen Minick, Senate Committee on Natural Resources and Economic Development, Apr. 1, 2016.

application even without the new procedures. This is because the permit application was for a type of permit that is not subject to contested case hearings. Nevertheless, a contested case hearing was requested, so the application was set for the Commissioners' Agenda Meeting. Since the permit was not eligible for a contested case hearing, the request was denied.[708] Therefore, no permits have actually been evaluated under the new S.B. 709 procedures. In other words, the Commission has not had to adjudicate someone's status as an affected person; the Commission has not had the opportunity to apply the new list of criteria for determining if a permit should be referred to SOAH; no cases have been referred to SOAH on direct referral at the request of applicants; and no applicants have seen the results of the new presumptions with respect to their draft permits.

The Committee will continue to monitor the status of permit applications and their movements under the new procedures.

III. Electric Utility Rate Adjustments

The Committee took no action on this charge.

[708] The Commissioners' Agenda can be accessed here: https://www.tceq.texas.gov/assets/public/comm_exec/agendas/comm/marked/2016/160525.Mrk.pdf. On the agenda, a link is provided for each permit application to be discussed, which accesses every document that is part of the record for the permit application.

Appendix A

LE'S SALE

d out of the 410th Judicial District Court of , in favor of April Sound Property Owners 14-03638-CV, in the 410th Judicial District anuary, 2016, against Lateral Investments,

ty:

ble Precinct 1, Montgomery County, Texas, ty described below, and on the 6th day of mpson, 4th Floor, Suite 402, Conroe, Texas t bidder, all right, title, and interest that the ty described below:

ON SEVEN (7), A SUBDIVISION IN TO THE MAP OR PLAT THEREOF CABINET A, SHEET 165 OF THE PAP XAS, COMMONLY KNOWN AS 104 OCATED IN MONTGOMERY COUNTY, LIEN BEING CREATED BY THE D RESTRICTIONS FOR APRIL SOUND OF RECORD IN JUNE 13, 1974 AT

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

NOTICE OF RECEIPT OF APPLICATION AND INTENT TO OBTAIN AIR QUALITY STANDARD PERMIT REGISTRATION RENEWAL

AIR QUALITY REGISTRATION NO. 79088

APPLICATION Rock Solid Precast, LP, has applied to the Texas Commission on Environmental Quality (TCEQ) for renewal of Registration No. 79088, for an Air Quality Standard Permit for Concrete Batch Plants, which would authorize continued operation of a Concrete Batch Plant located at 11393 Sleepy Hollow Road, Conroe, Montgomery County, Texas 77385. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.17472&lng =-95.40889&zoom=13&type=r. The existing facility is authorized to emit the following air contaminants: particulate matter including (but not limited to) aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

This application was submitted to the TCEQ on July 26, 2016. The application will be available for viewing and copying at the TCEQ central office, the TCEQ Houston regional office, and the Montgomery County Memorial Library System – South

ty described below, and on the 6th day of
mpson, 4th Floor, Suite 402, Conroe, Texas
t bidder, all right, title, and interest that the
ty described below:

ON SEVEN (7), A SUBDIVISION IN
TO THE MAP OR PLAT THEREOF
CABINET A, SHEET 165 OF THE PAP
XAS, COMMONLY KNOWN AS 104
OCATED IN MONTGOMERY COUNTY,
LIEN BEING CREATED BY THE
ID RESTRICTIONS FOR APRIL SOUND
) OF RECORD IN JUNE 13, 1974 AT
CUMENT NO. 348677 OF THE DEED
S AMENDED AND SUPPLEMENTED

TX 77356

Montgomery County, Texas
latcher, Chief Deputy

NCLUSION OF SALE
M.
NO WARRANTIES, EXPRESSED OR
) THE IMPLIED WARRANTIES OF
JLAR PURPOSE. YOU HAVE BOUGHT
ADVISED THAT THE PURCHASE OF
AY NOT EXTINGUISH ANY LIENS OR
VE SIMPLY PURCHASED WHATEVER
RTY. IF YOU HAVE ANY QUESTIONS,
CHOICE.
August 17, 24, 31, 2016

LE'S SALE

ued out of the **284th** Judicial District Court
2016, in favor of **April Sound Property**
ause No. **15-04-03669-CV**, in the **284th**
n the 11th Day of February, 2016, against

'S, FEES AND COLLECTIONS COSTS

EY'S FEES

ty:

ble Precinct 1, Montgomery County, Texas,
ty described below, and on the **6th day of**
Thompson, 4th Floor, Suite 402, Conroe,
highest bidder, all right, title, and interest
he property described below:

7, A SUBDIVISION IN MONTGOMERY
T THEREOF RECORDED IN VOLUME
E MAP RECORDS OF MONTGOMERY
CAPETOWN WAY , MONTGOMERY ,
TY, TEXAS.
TX 77356

humley, Constable PCT. 1 Montgomery

...ation of a Concrete Batch Plant located at 113... Sleepy Hollow Road, Conroe, Montgomery County, Texas 77385. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.17472&lng=-95.40889&zoom=13&type=r. The existing facility is authorized to emit the following air contaminants: particulate matter including (but not limited to) aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

This application was submitted to the TCEQ on July 26, 2016. The application will be available for viewing and copying at the TCEQ central office, the TCEQ Houston regional office, and the Montgomery County Memorial Library System – South Regional Branch, 2101 Lake Robbins Drive, The Woodlands, Montgomery County, Texas, beginning the first day of publication of this notice. The facility's compliance file, if any exists, is available for public review in the Houston regional office of the TCEQ.

The executive director has determined the application is administratively complete and will conduct a technical review of the application. Information in the application indicates that this permit renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. **The TCEQ may act on this application without seeking further public comment or providing an opportunity for a contested case hearing if certain criteria are met.**

PUBLIC COMMENT You may submit public comments, or a request for a contested case hearing to the Office of the Chief Clerk at the address below. The TCEQ will consider all public comments in developing a final decision on the application. **The deadline to submit public comments is 15 days after the final newspaper notice is published.** After the deadline for public comments, the executive director will prepare a response to all relevant and material, or significant public comments. Issues such as property values, noise, traffic safety, and zoning are outside of the TCEQ's jurisdiction to consider in the permit process.

After the technical review is complete the executive director will consider the comments and prepare a response to all relevant and material, or significant public comments. If only comments are received, the response to comments, along with the executive director's decision on the application, will then be mailed to everyone who submitted public comments or who is on the mailing list for this application, unless the application is directly referred to a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING You may request a contested case hearing. The applicant or the executive director may also request that the application be directly referred to a contested case hearing after technical review of the application. A contested case hearing is a legal proceeding similar to a civil trial in state district court. Unless a written request for a contested case hearing is filed within 15 days from this notice, the executive director may act on the application. **If no hearing request is received within this 15-day period, no further opportunity for hearing will be provided.** According to the Texas Clean Air Act § 382.056(o) a contested case hearing may only be granted if the applicant's compliance history is in the lowest classification under applicable compliance history requirements and if the hearing request is based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission may only grant a hearing on those issues submitted during the public comment period and not withdrawn.

A person who may be affected by emissions of air contaminants from the facility is entitled to request a hearing. If requesting a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a specific description of how you would be adversely affected by the application and air emissions from the facility in a way not common to the general public; (5) the location and distance of your property relative to the facility; (6) a description of how you use the property which may be impacted by the facility; and (7) a list of all disputed issues of fact that you submit during the comment period. If the request is made by a group or association, one or more members who have standing to request a hearing must be identified by name and physical address. The interests

7, A SUBDIVISION IN MONTGOMERY
T THEREOF RECORDED IN VOLUME
E MAP RECORDS OF MONTGOMERY
CAPETOWN WAY , MONTGOMERY ,
TY, TEXAS.
TX 77356

Thumley, Constable PCT. 1 Montgomery

ichael A. Hatcher, Chief Deputy

NCLUSION OF SALE
1.
NO WARRANTIES, EXPRESSED OR
) THE IMPLIED WARRANTIES OF
JLAR PURPOSE. YOU HAVE BOUGHT
ADVISED THAT THE PURCHASE OF
AY NOT EXTINGUISH ANY LIENS OR
VE SIMPLY PURCHASED WHATEVER
RTY. IF YOU HAVE ANY QUESTIONS,
CHOICE.
August 17, 24, 31, 2016

ON—CLASS 5
EXAS

OEMI CRUZ, Deceased

intiff's petition at or before 10 O'Clock
10) days from the date of Publication of
Law #2 of MONTGOMERY County, at

P.

. VARGAS; MICHAEL B NEWMAN;
LE

YSI CRUZ, as Plaintiff, and

Defendant.

to wit:
LINE HEIRSHIP

ce in CONROE, Texas, this 18th day of

CTURNBULL,
NTY CLERK MONTGOMERY

ndy Faught, Deputy
Published Date: August 24, 2016

ERS PLEASE
KING DAYS
R'S AFFIDAVIT

A person who may be affected by emissions of air contaminants from the facility is entitled to request a hearing. If requesting a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a specific description of how you would be adversely affected by the application and air emissions from the facility in a way not common to the general public; (5) the location and distance of your property relative to the facility; (6) a description of how you use the property which may be impacted by the facility; and (7) a list of all disputed issues of fact that you submit during the comment period. If the request is made by a group or association, one or more members who have standing to request a hearing must be identified by name and physical address. The interests which the group or association seeks to protect must also be identified. You may also submit your proposed adjustments to the application/permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing within 15 days following this notice to the Office of the Chief Clerk, at the address below.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for contested case hearing to the Commissioners for their consideration at a scheduled Commission meeting. The Commission may only grant a request for a contested case hearing on issues the requestor submitted in their timely comment s that were not subsequently withdrawn. If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact or mixed questions of fact and law relating to relevant and material air quality concerns submitted during the comment period. Issues such as property values, noise, traffic safety, and zoning are outside of the Commission's jurisdiction to consider in this proceeding.

MAILING LIST In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices for this specific application mailed by the Office of the Chief Clerk by sending a written request to the Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION Public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html, or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the Public Education Program toll free at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040.

Further information may also be obtained from Rock Solid Precast, LP, 11393 Sleepy Hollow Road, Conroe, Texas 77385-6179 or by calling Mr. Douglas Jackson, Matrix New World Engineering, at (713) 359-8659.

Notice Issuance Date: August 11, 2016
Publication Date: August 24, 2016

PUBLIC NOTICE

SELF SERVICE STORAGE OF CONROE WISHING TO AVAIL THEMSELVES OF THE PROVISIONS OF CHAPTER 59 OF THE TEXAS PROPERTY CODE HEREBY GIVES NOTICE OF SALE UNDER SAID ACT THIS SALE IS BEING MADE TO SATISFY A LANDLORDS LIEN BIDS WILL BE ACCEPTED ON LINE AT WWW.storagetreasures.com. starting on 09/14/2016 CONTENTS ARE MISCELLANEOUS, HOUSEHOLD GOODS AND PERSONAL ITEMS OF TENANT(S) AS LISTED: ERNESTO ABREGO, ANGIE BRADFORD, WILLIAM CARCAMO, MICHELL NAGY, DEREK RIVERS: PAYMENTS WILL BE MADE IN CASH ONLY SELF SERVICE STORAGE RESERVES THE RIGHT TO REJECT ANY BID AND WITHDRAW PROPERTY FROM SALE.
PUBLISHED DATES: August 24, 2016 AND August 31, 2016

Legales / Avisos Públicos

Comisión de Calidad Ambiental de Texas

AVISO DE RECIBO DE SOLICITUD E INENCIÓN DE OBTENER REGISTRO DE RENOVACIÓN DE PERMISO ESTÁNDAR DE CALIDAD DE AIRE

NÚM. DE REGISTRO DE CALIDAD DE AIRE 79088

SOLICITUD Rock Solid Precast, LP, ha solicitado a la Comisión de Calidad Ambiental de Texas (TCEQ por sus siglas en inglés) para renovación de Permiso Estándar de Calidad de Aire para plantas de concreto, Núm. de Registro 79088, el cual autorizaría el funcionamiento continuado de una planta de concreto ubicada en 11393 Sleepy Hollow Road, Conroe, Condado de Montgomery, Texas 77385. En la sección de avisos públicos de este periódico se encuentra información adicional sobre esta solicitud. Este enlace a un mapa electrónico de la ubicación general del sitio o de la instalación es proporcionado como una cortesía pública y no es parte de la solicitud o del aviso. Para la ubicación exacta, consulte la solicitud.
http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.17472&lng=-95.40889&zoom=13&type=r La instalación existente emitirá los siguientes contaminantes atmosféricos: materia en partículas, incluyendo (pero no limitado a) agregados, cemento, polvo de la calle, y las partículas con diámetros de 10 micras o menos y 2.5 micras o menos.

Esta solicitud se presentó a la TCEQ el 26 de Julio del año 2016. La solicitud estará disponible para ser revisado y copiado en la oficina central de la TCEQ, en la oficina regional de la TCEQ en Houston, y Montgomery County Memorial Library System – South Regional Branch, 2101 Lake Robbins Drive, The Woodlands, Montgomery County, Texas, comenzando el primer día de la publicación de este aviso. El expediente de cumplimiento normativo de la instalación, si alguno existe, está disponible para su revisión en la oficina regional de la TCEQ en Houston.

El director ejecutivo de la TCEQ ha determinado que la solicitud está completa administrativamente y llevará a cabo un examen técnico de la solicitud. La información contenida en la solicitud indica que esta renovación del permiso no daría lugar en un aumento de las emisiones permitidas y no daría lugar en la emisión de un contaminante del aire no emitido previamente. **La TCEQ puede actuar sobre esta solicitud sin buscar comentarios públicos adicionales o dar una oportunidad para una audiencia de caso impugnado si se cumple con ciertos criterios.**

COMENTARIO PÚBLICO Usted puede presentar comentarios públicos, o solicitar una audiencia de caso impugnado a la Oficina del Secretario Oficial al domicilio a continuación. La TCEQ tomará en cuenta todos los comentarios públicos en la decisión final de la solicitud. **La fecha límite para presentar comentarios públicos es 15 días después de que se publique el aviso en el periódico.** Después de la fecha límite para comentarios públicos, el director ejecutivo preparará una respuesta para todos los comentarios públicos pertinentes y materiales, o significativos. Cuestiones tales como valor de propiedad, ruido, seguridad del tráfico, y zonificación no están dentro de la jurisdicción de la TCEQ para abordarse en el proceso del permiso.

Después de el examen técnico de la solicitud se completa, el director ejecutivo tomará en cuenta los comentarios y preparará una respuesta a todos los comentarios públicos pertinentes y materiales, o significativos. Si sólo se reciben comentarios, la respuesta a los comentarios, junto con la decisión del director ejecutivo con respecto a la solicitud, será enviada por correo a todas aquellas personas

que esta renovación del permiso no daría lugar en un aumento de la [illegible]ones permitidas y no daría lugar en la emisión de un contaminante del aire no emitido previamente. **La TCEQ puede actuar sobre esta solicitud sin buscar comentarios públicos adicionales o dar una oportunidad para una audiencia de caso impugnado si se cumple con ciertos criterios.**

COMENTARIO PÚBLICO Usted puede presentar comentarios públicos, o solicitar una audiencia de caso impugnado a la Oficina del Secretario Oficial al domicilio a continuación. La TCEQ tomará en cuenta todos los comentarios públicos en la decisión final de la solicitud. **La fecha límite para presentar comentarios públicos es 15 días después de que se publique el aviso en el periódico.** Después de la fecha límite para comentarios públicos, el director ejecutivo preparará una respuesta para todos los comentarios públicos pertinentes y materiales, o significativos. Cuestiones tales como valor de propiedad, ruido, seguridad del tráfico, y zonificación no están dentro de la jurisdicción de la TCEQ para abordarse en el proceso del permiso.

Después de el examen técnico de la solicitud se completa, el director ejecutivo tomará en cuenta los comentarios y preparará una respuesta a todos los comentarios públicos pertinentes y materiales, o significativos. Si sólo se reciben comentarios, la respuesta a los comentarios, junto con la decisión del director ejecutivo con respecto a la solicitud, será enviada por correo a todas aquellas personas que presentaron comentarios públicos o quienes se encuentren en la lista de correo para esta solicitud, a menos que la solicitud sea remitida directamente para una audiencia de caso impugnado.

OPORTUNIDAD PARA UNA AUDIENCIA DE CASO IMPUGNADO Usted puede solicitar una audiencia de caso impugnado. El solicitante o el director ejecutivo también pueden pedir que la solicitud se remita directamente a una audiencia de caso impugnado después del examen técnico de la solicitud. Una audiencia de caso impugnado es un proceso legal parecido a un juicio civil en un tribunal de distrito del estado. A menos que se presente una petición por escrito para una audiencia de caso impugnado dentro de 15 días de esta notificación, el director ejecutivo puede autorizar la solicitud. **Si no se recibe una petición para audiencia dentro del plazo de 15 días, no se dará otra oportunidad para una audiencia.** De acuerdo con la Ley de Aire Limpio de Texas, § 382.056(o), sólo se puede conceder una audiencia de caso impugnado si el historial de cumplimiento normativo del solicitante se encuentra en la clasificación más baja de acuerdo a los requisitos aplicables de historial de cumplimiento normativo y si la petición para audiencia está basada en cuestiones de hecho en disputa que son pertinentes y materiales para la decisión de la Comisión con respecto a la solicitud. Además, la Comisión solo concederá una audiencia sobre esas cuestiones que se presenta durante el período de comentarios públicos y no se retiren.

Una persona que puede estar afectada por contaminantes de emisiones atmosféricas de una planta tiene derecho a solicitar una audiencia. Si se solicita una audiencia de caso impugnado, debe presentar lo siguiente: (1) su nombre (o para un grupo o asociación, un representante oficial), dirección, y número de teléfono; (2) el nombre del solicitante y número del permiso; (3) la declaración "[yo/nosotros] solicito/solicitamos una audiencia de un caso impugnado"; (4) una descripción específica de cómo se vería adversamente afectado por la solicitud y emisiones atmosféricas de la planta de manera que no es común para el público en general; (5) la ubicación y la distancia de su propiedad con relación a la planta; (6) una descripción de cómo usa la propiedad que pueda ser afectada por la planta; y (7) una lista de todas las cuestiones de hecho en disputa que usted presente durante el período de comentarios. Si la petición la hace un grupo o asociación, uno o más miembros que tienen derecho a solicitar una audiencia deben ser identificados por su nombre y dirección física. Los intereses que el grupo o la asociación busca proteger también se deben identificar. También puede presentar sus modificaciones propuestas a la solicitud/al permiso que satisfarían sus inquietudes. Las peticiones para una audiencia de caso impugnado deben presentarse por escrito dentro de 15 días después de este aviso, a la Oficina del Secretario Oficial a la dirección a continuación.

Después del cierre de todos los períodos de comentarios y de petición que aplican, el director ejecutivo enviará las solicitudes y cualquier petición para una audiencia de caso impugnado a los Comisionados de la TCEQ para su consideración durante una reunión programada de la Comisión. La Comisión sólo puede conceder una solicitud de una audiencia de caso impugnado sobre los temas que el solicitante haya presentado en sus comentarios oportunos que no fueron retirados posteriormente. **Si se concede una audiencia, el tema de la audiencia estará limitado a cuestiones de hecho en disputa o cuestiones mixtas de hecho y de derecho relacionadas a intereses pertinentes y materiales de calidad atmosférica que se hayan planteado durante el período de comentarios.** Cuestiones tales como valor de propiedad, ruido, seguridad de tráfico y zonificación no están dentro de la jurisdicción de la Comisión para abordarse en este proceso judicial.

LISTA DE CORREO Además de presentar comentarios públicos, puede solicitar que le incluyan en una lista de correo para esta solicitud al enviar una petición a la Oficina del Secretario Oficial de la TCEQ en la dirección a continuación.

CONTACTOS DE LA AGENCIA E INFORMACIÓN Comentarios públicos y peticiones se deben entregar por el Internet a www.tceq.texas.gov/about/comments.html o se deben enviarse por escrito a la Oficina del Secretario Oficial, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. Si se comunica con la TCEQ por vía electrónica, por favor tenga en cuenta que su dirección de correo, como su dirección actual, pasará a formar parte del registro público de la agencia. Para más información sobre esta solicitud de permiso o sobre el proceso de permisos, por favor llame sin cobro al Programa de Educación del Público al 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040.

Se puede obtener información adicional también de Rock Solid Precast, LP, 11393 Sleepy Hollow Road, Conroe, Texas, 77385-6179 o al llamar al Sr. Douglas Jackson, Matrix New World Engineering, al número 713-339-8659.

Fecha de Expedición: el 11 de agosto, 2016

:A. 2329
)08. PRE-
auto de
713-714-

LAME YA
V. ¡Usted
vd, Hous-

EZ & AS-
en casos
igración.

ÁLEZ &
; de acci-
ncia. 713-

O PARA
s de hui-
é Gonzá-

NTE! AC-
INAL. Ha-
Si no ga-
i16.

¡ABOGA-
Acciden-
conmigo
16.

HABLE PERSONALMENTE CON EL ABOGADO CÉSAR Escalante. Peleo para ganar su caso, si no gana, no tiene que pagar. 713-236-8616.

SI NECESITA ALGUIEN QUE LO DEFIENDA en un caso criminal, hable personalmente con el Abogado "Cesar Escalante". 713-236-8616.

EL ABOGADO CÉSAR ESCALANTE. PELEO PARA ganar su caso. Si no gana, no tiene que pagar. Llame ya mismo 713-236-8616.

CASOS FAMILIARES, DIVORCIOS, PATERNIDAD, CUSTODIA, MANUTENCIÓN de niños. Hable con el Abogado directamente. 713-695-2000. 4617 Bristol, St. Houston TX 77009.

INMIGRACIÓN: INFORMES DE LA NUEVA LEY. Deportaciones, visas de trabajo, peticiones familiares. 713-695-2000. No consulte secretarias. 4617 Bristol, Houston 77009.

HABLE CON EL ABOGADO DIRECTAMENTE PARA casos familiares, divorcios, paternidad,custodia, manutención de niños. 4617 Bristol, Houston, Tx 77009. 713-695-2000.

TICKETS DE TRÁNSITO, CASOS FAMILIARES, DIVORCIOS, paternidad, custodia, manutención de niños. Hable con el Abogado "Arnold", no consulte secretarias. 713-695-2000.

¡INFÓRMESE YA! TICKETS DE TRÁNSITO, CASOS familiares, divorcios, paternidad, custodia, manutención, de niños. Hable con el Abogado "Arnold", 713-695-2000.

¿ACCIDENTES DE AUTO? NO ESPERE, RECIBA atención médica. Llame 24 horas, 713-714-4444. ¡Usted tiene derechos! 2329 Ella Blvd, Houston 77008.

¿BUSCA ABOGADO QUE LE AYUDE CON accidente de auto? Abogada Hilda Sibrián le ayudará. ¡Si NO gano, NO paga! 713-714-4444.

ABOGADA HILDA SIBRIÁN ES LISTA, HONESTA, tenaz. ¿Tiene accidente de auto? ¡Yo le ayudaré! Si NO gano, NO PAGA. 713-714-4444.

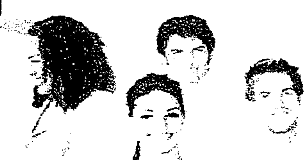
¿LE CHOCARON SU CARRO? NOSOTROS LE ayudamos, accidentes de auto y de 18 ruedas, Abogada Hilda Sibrián. 713-714-4444.

Legales / Avisos Públicos

A TODAS LAS PERSONAS Y PARTES INTERESADAS:

Rock Solid Precast, LP, ha solicitado a la Comisión de Calidad Ambiental de Texas (TCEQ por sus siglas en inglés) para renovación de Permiso Estándar de Calidad de Aire para plantas de concreto, Núm. de Registro 79088, el cual autorizaría el funcionamiento continuado de una planta de concreto ubicada en 11393 Sleepy Hollow Road, Conroe, Condado de Montgomery, Texas 77385. En la sección de avisos públicos de este periódico se encuentra información adicional sobre esta solicitud.

Profesionales



EZ & AS-
en casos
igración.

ÁLEZ &
s de ac-
ligencia.

O PARA
s de hui-
é Gonzá-

NCIA EL
sita visite
ta.com

NTE! AC-
IMINAL.
nte. Si no
8616

¡INFÓRMESE YA! TICKETS DE TRÁN-

ABOGADO MARIO CABALLERO. IN-

AYUDAMOS A LOS PADRES, ABUELOS Y familias en Texas con custodia, divorcios, visitaciones y más. ¡35 años de experiencia! 713-510-5500.

ASISTENCIA LEGAL PARA LAS FAMILIAS DE bajos ingresos de Texas. No espere más y llámenos. 713-510-5500.

¿NECESITA ASISTENCIA LEGAL PARA SU DIVORCIO? ¿Abogados demasiado caros? ¡Permítanos ayudarle! 713-510-5500.

¿ES INMIGRANTE Y NECESITA ASISTENCIA LEGAL para su caso familiar? ¡Nosotros lo ayudamos! Llámenos hoy. 713-510-5500.

"AREOLA & ASSOCIATES" LE AYUDA CON sus casos de inmigración,

¿VÍCTIMA DE UN ACCIDENTE? NOSOTROS LE ayudamos a obtener la mayor compensación, no importa su estatus migratorio. 832-282-5253. 5312 Irvington.

NOSOTROS LE AYUDAMOS A OBTENER LA mayor compensación que merece por sus lesiones y a pelear por sus derechos. 832-282-5253.

¿ES VÍCTIMA DE UN ACCIDENTE DE auto, camión de 18 ruedas, construcción, caídas, muerte por negligencia? Llame hoy: 832-282-5253.

¿VÍCTIMA DE ACCIDENTE INDUSTRIAL? HABLE CON Diana Salinas hoy. No importa su estatus migratorio. ¡Consulta gratis! 832-282-5253.

Appendix B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

NOTICE OF APPLICATION AND PRELIMINARY DECISION FOR AN AIR QUALITY PERMIT

PROPOSED PERMIT NUMBER: 101195

APPLICATION AND PRELIMINARY DECISION. SolvChem, Inc., 1904 Mykawa Rd, Pearland, Texas 77581-3210, has applied to the Texas Commission on Environmental Quality (TCEQ) for issuance of Proposed Air Quality Permit Number 101195, which would authorize chemical distribution at the Solvchem Midlothian Facility located at 881 Dividend Rd, Midlothian, Ellis County, Texas 76065. This application was submitted to the TCEQ on February 21, 2012. The proposed facility will emit the following contaminants: organic compounds including but not limited to acetone.

The executive director has completed the technical review of the application and prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision to issue the permit because it meets all rules and regulations. The permit application, executive director's preliminary decision, and draft permit will be available for viewing and copying at the TCEQ central office, the TCEQ Dallas/Fort Worth regional office, and at the A. H. Meadows Library, 923 South 9th Street, Midlothian, Ellis County, Texas, beginning the first day of publication of this notice. The facility's compliance file, if any exists, is available for public review at the TCEQ Dallas/Fort Worth Regional Office, 2309 Gravel Dr, Fort Worth, Texas.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comment or to ask questions about the application. The TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing. **You may submit additional written public comments within 30 days of the date of newspaper publication of this notice in the manner set forth in the AGENCY CONTACTS AND INFORMATION paragraph below.**

RESPONSE TO COMMENTS AND EXECUTIVE DIRECTOR ACTION. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. Because no timely hearing requests have been received, after preparing the response to comments, the executive director may then issue final approval of the application. **The response to comments, along with the executive director's decision on the application will be mailed to everyone who submitted public comments or is on a mailing list for this application, and will be posted electronically to the Commissioners' Integrated Database (CID).**

INFORMATION AVAILABLE ONLINE. When they become available, the executive director's response to comments and the final decision on this application will be accessible through the Commission's Web site at www.tceq.texas.gov/goto/cid. Once you have access to the CID using the above link, enter the permit number for this application which is provided at the top of this notice. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application.

http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.4741&lng=-96.9563&zoom=13&type=t

MAILING LIST. You may ask to be placed on a mailing list to obtain additional information on this application by sending a request to the Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INEORMATION. Public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html, or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the Public Education Program toll free at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040.

Further information may also be obtained from Solvchem Inc at the address stated above or by calling Mr. Pratap N Padalkar, Corporate Environmental Health & Safety Manager at (832) 300-4023.

Notice Issuance Date: December 27, 2013

TO ALL INTERESTED PERSONS AND PARTIES:

SolvChem, Inc., has applied to the Texas Commission on Environmental Quality (TCEQ) for issuance of Proposed Air Quality Permit Number 101195, which would authorize construction of a Solvchem Midlothian Facility located at 881 Dividend Rd, Midlothian, Ellis County, Texas 76065. Additional information concerning this application is contained in the public notice section of this newspaper.

Noticias

Comisión de Calidad Ambiental del Estado de Texas

AVISO DE LA SOLICITUD Y DECISION PRELIMINAR PARA UN PERMISO DE LA CALIDAD DEL AIRE

PROPUESTA NÚMERO DE PERMISO: 101195

SOLICITUD Y DECISION PRELIMINAR. SolvChem, Inc., 1904 Mykawa Rd, Pearland, Texas 77581 a 3210, ha solicitado a la Comisión de Calidad Ambiental de Texas (TCEQ) para la emisión del Proyecto de Calidad del Aire Permiso número 101195, que autorizaría distribución de productos químicos en la Instalación Solvchem Midlothian ubicada en 881 dividendo Rd, Midlothian, Ellis County, Texas 76065. Esta solicitud se presentó a la TCEQ el 21 de febrero de 2012. La instalación propuesta emitirá los siguientes contaminantes: compuestos orgánicos, incluyendo, pero no limitado a la acetona.

El director ejecutivo ha completado la revisión técnica de la solicitud y ha preparado un borrador del permiso que, de aprobarse, establecería las condiciones bajo las cuales la instalación debe operar. El director ejecutivo ha tomado una decisión preliminar para expedir el permiso, ya que cumple todas las normas y reglamentos. La solicitud del permiso, la decisión preliminar del director ejecutivo, y el proyecto de permiso estarán disponibles para su visualización y la copia en la oficina central de TCEQ, la oficina regional de la TCEQ Dallas / Fort Worth, y en el Meadows Library AH, 923 South 9th Street, Midlothian, Ellis County, Texas, a partir del primer día de publicación del presente anuncio. Archivo de cumplimiento de la instalación, si es que existe, está disponible para la revisión del público en la Oficina Regional de Dallas / Fort Worth TCEQ, 2309 Gravel Dr, Fort Worth, Texas.

COMENTARIOS PÚBLICOS / REUNIÓN PÚBLICA. Usted puede presentar comentarios públicos o pedir una reunión pública sobre esta solicitud. El propósito de una reunión pública es dar la oportunidad de presentar comentarios o hacer preguntas acerca de la solicitud. La TCEQ realiza una reunión pública si el Director Ejecutivo determina que hay un grado de interés público suficiente en la solicitud o si un legislador local. Una reunión pública no es una audiencia administrativa de lo contencioso. **Usted puede presentar comentarios públicos adicionales por escrito dentro de los 30 días siguientes a la fecha de publicación del periódico de esta notificación en la forma establecida en la AGENCIA CONTACTOS E INFORMACIÓN párrafo siguiente**

RESPUESTA A LOS COMENTARIOS Y ACCIÓN DIRECTOR EJECUTIVO. Transcurrido el plazo para comentarios del público, el director ejecutivo tendrá en cuenta los comentarios y preparará una respuesta a todo los comentarios públicos esenciales, pertinentes, o significativos. Debido a que no hay solicitudes de audiencia a tiempo se han recibido, después de la preparación de la respuesta a los comentarios, el Director Ejecutivo podrá entonces emitir la aprobación finial de la solicitud. **La respuesta a los comentarios, junto con la decisión del Director Ejecutivo sobre la solicitud será enviada por correo a todos los que presentaron un comentario público o se encuentra en una lista de correo para esta aplicación, y se publicará electrónicamente a la Base de datos integrada de los Comisionados (CID).**

INFORMACION DISPONIBLE EN LINEA. Cuando estén disponibles, la respuesta del director ejecutivo a los comentarios y la decisión final sobre esta aplicación se podrá acceder a través del sitio web de la Comisión en www.tceq.texas.gov/goto/cid. Una vez que tenga acceso al CID usando el enlace de arriba, escriba el número de permiso para esta aplicación que se proporciona en la parte superior de este aviso. Este enlace a un mapa electrónico del sitio o ubicación general de las instalaciones se ofrece como cortesía pública y no como parte de la solicitud o notificación. Para conocer la ubicación exacta, consulte la aplicación. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.4741&lng=-96.9563&zoom=13&type=r.

LISTA DE CORREO. Usted puede solicitar ser incluido en una lista de correo para obtener información adicional sobre esta solicitud mediante el envío de una solicitud a la Oficina del Secretario Principal de la siguiente dirección.

AGENCIA CONTACTOS E INFORMACIÓN. Los comentarios del público y las solicitudes deben ser presentadas electrónicamente en www.tceq.texas.gov/about/comments.html, o por escrito a la Comisión de Texas sobre Calidad Ambiental, Oficina del Secretario Principal, MC-105, PO Box 13087, Austin, Texas 78711-3087. Si usted se comunica con la TCEQ electrónicamente, por favor, ser conscientes de que su dirección de correo electrónico, como su dirección postal física, pasará a formar parte del registro público de la agencia. Para obtener más información sobre esta solicitud de permiso o el proceso del permiso, por favor llame gratis al Programa de Educación Pública al 1 800 687 4040. Si DESEA información en Español, LLAMAR Florerías al 1-800-687-4040.

Para más información también se puede obtener de Solvchem Inc, a la dirección indicada arriba o llamando al Sr. Pratap N Padalkar, Corporate Environmental Health & Safety Manager al (832) 300-4023.

Aviso Fecha de emisión: 27 de diciembre 2013

Noticias

A TODAS LAS PERSONAS Y LAS PARTES INTERESADAS:

SolvChem, Inc., ha solicitado a la Comisión de Calidad Ambiental de Texas (TCEQ) para la emisión del Proyecto de Calidad del Aire Permiso número 101195, que autorizaría la construcción de un Centro de Solvchem Midlothian ubicada en 881 Dividend Rd, Midlothian, Ellis County, Texas 76065. Información adicional relativa a esta aplicación se encuentra en la sección de avisos públicos de este diario.